CONSTITUTIONAL HISTORY

OF

South Carolina

FROM 1725 TO 1775.

BY

D. D. WALLACE, A. M.,

ADJUNCT PROFESSOR OF HISTORY AND ECONOMICS IN WOFFORD COLLEGE.

PRESENTED AT VANDERBILT UNIVERSITY FOR THE DEGREE OF DOCTOR OF PHILOSOPHY.

ABBEVILLE, S. C.:
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ERRATA.

Page 11, last line, last word; *spell* preceding.

Page 13, twelfth line; *strike out second* n *in* Hannover.

Page 13, ninth line from bottom; *spell* tranquillity.

Page 22, ninth line from bottom; *strike out* simply; in line above, *after* that *insert* in some instances.

Page 22, ninth line from bottom; *spell* notarial.

Page 26, eleventh line from bottom; *spell* villians.

Page 27, second line from bottom; *spell* forbade.

Page 35, twelfth line from bottom; *spell* Britain.

Page 40, third line from bottom; *spell* adjourned.

Page 49, fourth line; *spell* its.

Page 66, fourth line from bottom; *read*, ten of its members, leading men, etc.

Page 92, seventh line from bottom; *read* makes.

NOTE.

The present publication is not a complete work, nor is it a portion of an uncompleted work; it is only the first part of "The Constitutional History of South Carolina from 1725 to 1810," which is now in manuscript. This will explain the sense of incompleteness which will be experienced in reading these chapters, which constitute hardly one-third of the whole. I have treated the whole period from 1725, and especially from 1765, to 1810 as a unit, for reasons which appear in the work; it is therefore not properly susceptible of division. I hope in the near future to issue the complete study in book form.

The Preface and Bibliography in the following pages belong to the complete thesis, and were not written only for the portion now issued.

PREFACE.

My object has been to trace the constitutional development of the people of South Carolina. If there is a wearisome multiplication of details it is due to going too far in my desire to make the history perfectly intelligible and likewise realistic. This is made the more necessary by the meagre treatment given by the general histories to South Carolina, and by the many egregious blunders in matters of fact in many of them.

Two thoughts have been paramount in my method of work: first, to find the truth; and second, to co-ordidate, subordinate and group facts so as to exhibit their essential significance, and allow them to display the manner in which they were the mediums for the transmission of constitutional development. Let us find what actually are the facts; that ascertained, facts become but the expression of the actualization of the principles in operation and the ever new starting point for further unfolding.

Added to these two professional ideas has been that of love for its own sake of the element in which I have worked. Indeed, properly speaking this is also a professional requisite if one's ideal is not to be barren, heartless and dwarfed. As a native South Carolinian I feel an affection for my State's history and a pride in what of it is noble. I have not, however, written from the standpoint of the South Carolinian, but from that of the historian. This work may possess little worth at best; certainly its value would have been small and its interest narrow had I taken the provincial point of view.

All the facts, except some of those in the comparative history outside South Carolina and except a few within the State, are from original sources, mainly manuscripts and contemporary newspapers. I have endeavored to get beyond the mere legislative and judicial records, by the use of letters and newspapers.[1]

I am under special obligations to the Charleston Library Society, and particularly to Dr. H. Baer, by whose courtesy I enjoyed the privileges of this institution. I take pleasure in thanking Mr. W. G. Hinson, of James Island, Charleston county, for extending me the unrestricted use of his library. Dr. Wilson, of Charleston, has also been so kind as to allow the use of the library of the South Carolina Historical Society, of which he is President.

Hon. D. H. Tompkins, former Secretary of State, and Hon. M. R. Cooper, the incumbent, as well as all the other occupants of the department offices, have been so uniformly helpful in furnishing every facility for the prosecution of the most important part of my work that I express with pleasure my warm appreciation.

I append, without discussing, the following bibliography.

D. D. WALLACE.

Vanderbilt University, April 25, 1899.

1 The title "Public Records," used below, is very inadequate. These Records are correspondence, etc., official and otherwise (nearly always official), on nearly every conceivable feature of the history of South Carolina from its settlement to the Revolution. They were recently copied from the Public Records Office in London.

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TABLE OF CONTENTS.

Chapter		Page
I.	Introductory	1
II.	The Royal Governor	4
III.	The Commons House of Assembly	9
IV.	His Majesty's Council	16
V.	The Courts Before 1769	21
VI.	Regulators, and the Circuit Act of 1769	25
VII.	The Stamp Act	32
VIII.	Relations of Commons and Council 1725 to 1765	47
IX.	Appropriation of Money on Sole Authority of the Commons	59
X.	Attempt of the Commons to Abolish the Legislative Character of the Council	78
XI.	Conclusion	90

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CHAPTER I.

Introductory.

It has been remarked by Prof. Rivers, in Windsor's Narrative and Critical History of America, that the most noteworthy feature in the colonial history of South Carolina is the growing power of the Commons House of Assembly. No statement could be made regarding the history of the province which would be at the same time so concise and so comprehensive. This increasing determination of the people to be self-governed was emphatically asserted in the revolution of 1719. That year is also a dividing point in the development. Before that date it was the struggle against the Lords Proprietors; afterwards, the contest against the arbitrary power of the King as expressed through the Royal Governor, and particularly the Council. To trace this struggle across the period from 1725

to 1775 is the theme of this paper. This period comprised the years of preparation for independent statehood. To understand the events we shall see enacted, some general view of the frame of government which was in existence will be of help.

No colony presented more glaring contrasts in social and governmental life than did South Carolina. Yet these contrasts were almost wholly factitious, destined by geography, products and social institutions to be brought in a few decades to an essential homogeneity. No society was more elegant than that of Charleston, the provincial capital; few more free, both from culture and restraint, than that of the distant back country, where two converging streams of Scotch-Irish and Germans, by land down the mountain ridges from Pennsylvania and the intervening colonies, and by sea through Charleston, were preparing to shift the governmental centre of gravity far from the City by the Sea. The low country "planter," ordained by God, as he said, not to labor in the swamps, might own thirty thousand acres and a thousand slaves; the up country "farmer" was better off without the "peculiar institution," and the grant book recorded his land in hundreds, not thousands, of acres.

The names that fill the pre-revolutionary history of South Carolina are all of low country families. Wealth as well as culture kept near the sea shore. As late as 1790, the city of Charleston alone paid 27 per cent. more taxes than the whole up country combined; while the three "districts" of Georgetown, Charleston and Beaufort, the area always meant at this time by the "low country," paid some three and one-half times the taxes of all the rest of South Carolina. The poorer up

country section had then four times the population of the other. Before the Revolution, the disproportion of wealth was even greater.

In Charleston, too, was the seat of government. There the Governor lived, the Assembly met, the courts convened. Until 1772 no court, except the feeble justices of the peace, and irresponsible similar courts for the trial of slaves, ever met outside the city. The up country likewise had not one representative in the legislature. Warping the meaning, we may say that if the maxim be true, that the country that is governed least is governed best, then the government of the up country left little to be desired.

The frame of government comprised the Governor, the Commons House of Assembly, the Council, and the Courts. These four were not organized into the three distinct branches of executive, legislative and judiciary; for the Governor, besides having a veto power, was something of a judge, and the Council was a mixture of all three. Here, let us note, lay one great cause of the gripings of the colony's constitution.

CHAPTER II.

The Royal Governor.

The Governor or Lieutenant-Governor was the chief executive of the colony and did the things usually done by chief executives. The difference between the Governor and the Lieutenant-Governor was, first, that the Governor was always an Englishman, and the Lieutenant-Governor always a South Carolinian. The one was never denied the more distinguished title and the other was never granted it. Second, the form of addressing the Governor was always "His Excellency;" of the Lieutenant-Governor, "His Honor." Third, when both were in the province, the Governor took precedence and administered the government.[1]

When the Governor was in the colony, the Lieutenant had no duties, unless by virtue of some other office. Both were commissioned and served without any reference to each other's terms of continuance.

1 Some controversy has been raised on the appointment of Lieutenant-Governors in South Carolina. Prof. E. L. Whitney, in his "Government of the Colony of South Carolina," page 15, says that Thomas Broughton was the only Lieutenant-Governor ever appointed in that colony. This is a serious mistake. I am sure that Dr. Whitney has not consulted the proper authorities. He has evidently written his study without any access to the Journals and records in Columbia, still in manuscript, the only source in this country from which the information can be obtained. I do not discover in his whole work a single reference to these authorities. I have examined thousands of pages of these records, including the details of the appointment of every chief executive under the royal government, and have found the facts as stated in the text above. For about twenty-five of the fifty-six years of royal government in South Carolina the province was administered by Lieutenant-Governors, of whom there were three. Gen. Edward McCrady, in his "South Carolina Under the Proprietary Government," p. 34, has already fully corrected this error of Prof. Whitney.

Not at all times by any means did both exist. Their terms were during royal pleasure. The annual pay of either was £3,500 currency, equal to £500 sterling, and a house worth £700 rental.[1] When part of the fiscal year was filled by one executive and part by a successor, each was paid exactly in proportion to the time of his service.

By the King's instructions, in the absence of both Governor and Lieutenant-Governor the oldest Councillor was to succeed temporarily, but was not to pass any law, unless of the most pressing necessity, without the express royal permission. On two occasions under the royal government this exigency arose: in 1726, and again in 1737. In the first instance Arthur Middleton was at the head of the government for several years and was addressed as "Mr. President;" and in the second, the elder William Bull held on this tenure for more than two years and was called Lieutenant-Governor.[2]

The Commons House of Assembly, who controlled the purse strings, always refused to admit that this or any other royal official's pay was a "salary." It was a "gift," or "allowance," they said, of the good people of South Carolina, which they might diminish or even withhold altogether whenever they saw fit. With this weapon they occasionally smote some Governor or judge whom they thought to have trespassed upon their rights.

1 Currency was one-seventh the value of sterling; proclamation money, five-sevenths the value of sterling. The value of proclamation money was fixed by royal proclamation, of Queen Anne, at a certain ratio. Of course that had no effect. I give the figures at which the moneys actually passed. (Statutes at Large of S. C., I., 428; Com. Jour. S. C., MS., XXXIX., pt. II., 132; Pub. Rec. S. C., MS., XXXI., 266.)

2 Pub. Rec. S. C., MS., VIII., 101; XXIX., 132.

The King used every effort and strategy to induce the Commons to attach fixed salaries to the positions of all his appointees who drew their pay from the colonial treasury. This the Commons steadily refused to do. The only instance in which the King carried his point was in the Circuit Court Act of 1769, which was such a pressing necessity that he could dictate terms to the legislature. The salaries of certain officials to be appointed under that law were accordingly by it fixed and were attached to the office.

The Governor had power of removing for cause councillors, judges, justices of the peace and other civil royal appointees, subject always to the final decision of the King. The Assembly and the Council frequently petitioned for removal, but the Governor was in no wise bound to follow their wishes. These addresses generally, if not always, came from these bodies separately, as such requests were usually only side strokes in the battles between them, each desiring the removal of its own enemies and of its enemies friends.[1]

The pardoning power also was exercised by the Governor, though in a sort of suspensive manner, subject to the King's allowance or disallowance. In this way a pardon from the Governor was strictly speaking a reprieve, likely to be confirmed by the ultimate authority because of the confidence entertained in him by the ministry.[2]

The Governor always met with the Council and presided, except when they were transacting purely legislative business or when he wished them to be absolutely uninfluenced by his presence. Usually on all his

1 Com. Jour. S. C., MS., XXXVII., pt. II., 101, 351-9, 391, 102.
2 Council Jour. S. C., MS., XXXIV., 152, 165; Pub. Rec. S. C., MS., XXXI., 425.

acts he consulted them, though he was not bound to take their advice. Yet he was nearly always governed by their counsel, so that practically there was a plural executive of which the Governor was chief; he was the executive officer of the executive.

The most important fact in connection with the Governor is that he was the channel through which the King's influence was exercised in the government of South Carolina. With his commission, he was given a long set of minute "instructions," followed from time to time by such "additional instructions" as were needed. These instructions were regarded by the King as the constitution of the province, not to be violated by the legislature, the Governor, or any other officer. Unusual proceedings of the legislature and constitutional questions were tested by them, just as our supreme court now tests such things by our written Constitution. The details of this and its constitutional significance will be treated at the proper place.[1]

The Governor was in constant, minute communication with the Secretary of State for the Colonies or the Board of Trade, from whom he received directions on permitting the building of a road and on everything else of a legislative character concerning the life of the people of the far away colony. What the King wanted done or not done was generally, not always, carried out as well as if the palace had been situated on Broad Street or the Battery.[2]

The right to veto absolutely all bills passed by the Assembly belonged to the Governor. Even more, all

1 The thorough treatment of this is in the unpublished part of this work, as its full significance does not appear until the formation of the early State Constitutions.

2 Pub. Rec. S. C., MS., XXX., 245.

laws must receive his signature; his simple indifference did allow them to pass. An act when signed by him acquired the force of law, unless it contained a suspending clause, and continued to operate unless annulled by the King. I do not observe that the King ever presumed to annul a law after it had been once allowed by him to go unchallenged. It was a ruse of the colonists, which sometimes succeeded, to secure the benefit of laws for which they knew the royal assent could not be expected by enacting that they should go into operation so quickly and for so short a time that their effect would already have been worked before the King could send notice of his veto. To prevent this the Royal Governor, from the very first, was instructed not to allow any act of an unusual nature, or affecting the King's prerogative, or previously vetoed by the King, to become a law until it had received the assent of the King himself. To all other laws the Governor might give his assent, provided they were to operate (except in a few cases) for not less than two years.[1]

The Governor had absolute power to adjourn, prorogue and dissolve the Assembly. They could not adjourn themselves, except from day to day, but by his consent.[2] The hybrid character of the Council is illustrated by the fact that it often advised the Governor in ordering a prorogation or dissolution, one House of the legislature thus contributing to the destruction of the other.

1 Pub. Rec. S. C., MS., XXVI., 276.
2 Com. Jour. S. C., MS., XXXVII., pt. I., 99; ib., pt. II., 206, 523, 700.

CHAPTER III.

The Commons House of Assembly.

The constitutional history of colonial South Carolina was made most largely by the Commons House of Assembly. The history of this body is the history of political liberty in the province. Therefore bear with this brief description, after which the Assembly will act out its own story before our eyes.

The Commons House of Assembly, the General Assembly, the Assembly, or, under protest in the later years, the Lower House of Assembly, was during the third quarter of the 18th century composed of forty-nine members. They were elected for a term of three years, but usually met the fate of an earlier dissolution.[1] The law required that they should be convened at least once in six months. They could be assembled, adjourned (except from day to day), prorogued, and dissolved only by the Governor or Lieutenant-Governor. For a long time before the Revolution, they were too proud, says Lieutenant-Governor Bull, to receive any pay, though at an earlier day they got their *per diem*. This was not again practiced until after independence.[2]

The system of representation was intertwined with the Episcopal established church. By the middle of the last century a changing community and an unchanging system presented many features of rotten borough injustice. In 1765 there were twenty parishes, electing from

1 Pub. Rec. S. C., MS., XXXII., 27.
2 Pub. Rec. S. C., MS., XIV., 153.

one to three members each.[1] In 1770 there were twenty-two. These parishes covered a strip of some fifty miles in breadth along the sea coast, widening in the centre at St. Matthew's to about ninety. The parishes theoretically extended to the western limits of the province, a provision with scarcely more practical result than that of the Charter of Charles II. extending the possessions of the Lords Proprietors westward to the Pacific Ocean.

Elections were held by the church wardens, or by appointed managers, at the parish church, except when good reasons indicated a better place, and lasted for two days. As only the small strip of country along the sea coast was organized into parishes, and as representation was solely on that basis, the back country was left wholly without representation. This injustice was felt to be very heavy. The back countrymen regarded it as their chief grievance, and the root of all their others. In 1768 numbers refused to pay taxes because unrepresented and threatened that if their complaints continued to be treated with slight and reproach, they would come down *en masse* and "force a due attention to their claims."[2] In about 1766 a popular leader from the upper section of St. Mark's, which theoretically including a large part of the whole province, brought down to the parish church on election day some one hundred and fifty of his partisans, captured the poll and went victoriously to the legislature.[3]

For the injustice of the representation two parties were responsible: the King of England and the low countrymen of South Carolina. The former refused to

1 Com. Jour. S. C., MS., XXXVII., 1.
2 Pub. Rec. S. C., MS., XXXII., 36.
3 Pamphlet of 1794 or 1807. I neglected to note the page or which pamphlet it is; but I think it is the first mentioned.

allow any increase in the number of the legislature;[1] and the latter refused to divide their membership of forty-nine with their unrepresented fellow citizens. One of the fiercest battles in the constitutional history of South Carolina was that in which, with stubborn injustice, the low country clung to its preponderant privileges until the year 1808.

The idea of requiring a member to live in the district he represented did not arise until long after the Revolution. The same man sometimes sat for different parishes in successive representative bodies.

From the very settlement of the colony, the problem of electoral qualifications was one of a proper mixture of property and religion. From 1670 to 1790 these are the two varying ingredients of the test. The law passed in 1759 was the regulation until the Revolution. This prescribed that a voter should be a "free white man, and no other person, professing the Protestant religion, who shall have attained the age of twenty-one years, and shall have been a resident and inhabitant of this province for the space of one year, at any time before the date of the writ to be issued for that election at which he shall offer to give his vote, and shall have a freehold estate in a settled plantation, or not less than one hundred acres of land unsettled, for which he shall have paid tax the preceeding year, or shall have a freehold estate in houses, lands or town lots or parts thereof of the value of sixty pounds proclamation money,[2] situated in Charleston or any other town of this province, for which he shall have paid the tax for the preceeding

1 Pub. Rec. S. C., MS., XXXI., 393-7; Com. Jour. S. C., MS., XXXVII., pt. II., 553.

2 Five-sevenths the value of sterling.

year, or shall have paid the sum of ten shillings proclamation money for his own proper tax the preceding year."[1]

One might vote in as many parishes as he was qualified in, or be elected from any parish. At a later date, when the election districts of the State had been divided for convenience into precincts, we find a law forbidding one to vote in more than one precinct, but no prohibition is made of one's voting in more than one district. This is perfectly logical under a property qualification, as all property should be represented.

In the expression "free white man" there is no superfluous term, as might perhaps be supposed. Not all free men were white, and not all white men were free. Besides the free negroes and the Indians, both of whom were excluded under this rule, there was also a pitiable class of whites known as "servants"; these were the same as the "indentured servants" of Virginia, Maryland, etc. They were never numerous in South Carolina, and in the latter half of the 18th century had become very few. These miserable persons, neither slaves nor freemen, were treated in almost all respects as slaves, except that the term of their servitude was limited. A law of 1717 expressly forbade them to vote. Their social condition was, however, much ameliorated in 1744.[2]

A member of Assembly was required to be a natural born subject of Great Britian or a foreigner naturalized by act of Parliament, having in South Carolina a settled freehold estate of 500 acres and 20 slaves, over and above all debts; or, he should have in his own right over

1 Statutes at Large of S. C., IV., 99.
2 Statutes at Large of S. C., III., 58.

and above all debts, houses, town lots or other lands in South Carolina to the value of £1,000 proclamation money.[1]

When a member elect appeared at the door of the House, the question was put to him by the Speaker whether he desired to "qualify." "Qualifying" meant swearing to one's qualifications for membership as prescribed by law. If the member elect assented, he made oath immediately in the presence of the House and was then conducted by a committee to the Governor, who administered the "state oaths," i. e. the oaths of allegiance to the House of Hannover, enmity to Stuart pretenders and their abettors, as prescribed in the Act of Settlement, and abjuration of transubstantiation and the papacy, in the manner required of British members of Parliament by the Test Act.[2]

Not infrequently members elect declined in the first instance to qualify. The Governor was then requested to issue a writ for the election of a substitute.[3] This apparent indifference to governmental position is explained by the absence, in ordinary times of political tranquility, of the incentive of party ardor. The aristocratic South Carolinian was too proud to rush for petty political distinction. This spirit, born of both pride and lack of a keen sense of civic duty, endured to a considerable extent as late as the Civil War. Service in a number of offices was made compulsory in the early Constitutions. Late in the present century urgent solicitations were often necessary to induce members of the class that ruled the State to accept public office.

1 Statutes at Large of S. C., IV., 99.
2 Com. Jour. S. C., MS., XXXVII., pt. II., 14; Taswell-Langmead, 656, 691.
3 Com. Jour. S. C., MS., XXXVIII., 15.

By an extralegal agreement, the representation of the city of Charleston, comprising the parishes of St. Philip and St. Michael, was drawn equally from the merchants and the mechanics.[1]

The privileges claimed by the Commons House of Assembly were, in brief, those of the British House of Commons. How far they succeeded in realizing the full extent of their assertions will best appear in the history we are to trace. Some of the most important of these privileges were firmly denied by the King; it is therefore that we shall witness some terrific parliamentary explosions. Sad was it for lesser individuals who withstood their claims; for the common jail in Charles Town was the sure goal of him who, unprotected by eminent position, dared to put contempt upon the privileges of the Commons House of Assembly.

The minute character of local affairs to which legislation descended was largely due to the complete absence of municipal, township and county self-government. Highway commissioners, church wardens and vestrymen were about the only local officers elected by the people. The Assembly widened a street in Charleston, closed a path through Dr. Alexander Garden's plantation, and reimbursed the wardens of St. John's, Berkeley, for repairing Rev. Hockley's parsonage.[2]

1 S. Carolina Gazette, Nov. 21, 1774. It is interesting to note that at this day James Island, now a part of Charleston County, by unwritten custom is allowed one member on the Charleston delegation. The James Island people agree on their man, and no matter how politics in the city go, everybody makes the Island man (or "countryman") one of his ticket. (For this I am indebted to Messrs. W. G. Hinson and E. S. Rivers, of James Island.)

Another interesting instance, before the formation of Dorchester County in 1897, was the allotment of one representative to one of the old parishes in Colleton County and two to the other. This, however, was from no contrariety of interests. It simply illustrates these extralegal distributions of representation.

2 Com. Jour. S. C., MS., XXXVII., pt. II., 279-81; ib., XXXIX., pt. II., 229.

"To this House, guardians as they are of the people's rights," says Rawlins Lowndes, I refer this affair of my having been discharged from the bench without cause, "contrary to the spirit of the English constitution." And so, to these guardians, as in very truth they were, were referred petitions and appeals on every violated liberty. If Governor, Council and King gave no relief, the Commons would at least "resolve", have reports from the Committee on Grievances, and excoriate the royal representatives in the government.

The great enemy of the Commons House of Assembly was His Majesty's Council—the Jebusites entrenched in Mt. Zion, to discomfit whom was the unwearied work of such 18th century Davids as Christopher Gadsden. Their long struggle raging around money bills and ending in the Commons absolutely denying legislative character to the Council and for a brief space absorbing the whole lawmaking authority, is the most exciting chapter in the parliamentary history of South Carolina. Let us now learn what this Council was.

CHAPTER IV.

His Majesty's Council.

His Majesty's Council, as their official title ran, were the South Carolina "King's friends." Forget all else, but remember this. A large part of the instructions to Governors was always devoted to these bulwarks of royal power. This body consisted of not more than twelve members. It is a mistake to say, as is usual, that the Council consisted of twelve; for the King's instructions even sometimes only say "not more than twelve." For long periods there was so small a number as eight, and the greater part of the time there were some vacancies. In 1754, e. g., there were but five Councillors in the province.[1]

A quorum of three was allowed to act, though the King desired five if possible.[2] Twenty-nine instances selected at random from their Journals from 1765 to 1767 show an average attendance of four, of whom a majority were often English placemen.

As the royal government made itself more and more obnoxious, the post of Councillor, formerly sought as an honor, was so disdained by the best citizens that seats went begging for months or even years, and it was often with the greatest difficulty that the Governor could assemble a corporal's guard of three in the Council chamber.

The only qualifications required of a Councillor

1 Pub. Rec. S. C., MS., XXXIX., 241, 344; XXX., 170; XXXII., 74, 85, etc.
2 Ib., VIII., 101; XIV., 149.

were that he be a gentleman of independent fortune and character, either a native or an Englishman, and devoted to the interests of the King.

The organization of this body violated sadly the rule of the separation of powers. Into it were tumbled every function of government and every style of officer. The judges, the attorney general, the Indian commissioner, the receiver general of His Majesty's quit rents, all upheld there the prerogative of their royal master. The duties of the Council were hardly less heterogeneous than its membership. It laid large hands on both executive and judicial as well as legislative functions. In the latter part of the period we are studying it is hard to say whether the Council was more of a legislative or of an executive body. The character of no other branch of the government under the royal rule was so revolutionized. In later chapters that revolution, which is much of the best history of South Carolina, will be seen working itself out in its proper relationships.

The executive functions of the Council have already been touched upon in the description of the Governor. Generally speaking, they discussed and advised upon every executive subject and act. Land grants and Indian affairs were among the most frequent and important matters which engaged their attention. In their Journals we find frequent "talks," treaties, and messages from such characters as Killagusta, Prince of Chote, Johnny of Toxana, Otasitie of Quaratchie, Judd's Friend, The Young Warrior of Estatoe, and Skallilosky of Chilhowey.[1]

There is no foundation in the King's instructions or

1 E. g. Council Jour., XXXII., 660.

in the actual history for the statement made by a recent writer,[1] that "nothing of importance could be done by the Governor without the consent of the Council first obtained." As most wise men would have done, the Governor usually asked the advice of his Council and usually followed it; but if he cared to take the responsibility, he might act without its advice and against its will.

In its legislative character, as prescribed by the King, the Council was given absolutely coordinate powers with the Commons, including by special mention the amendment and passing of money bills. Such a claim could never be admitted by their jealous rivals, the popular branch, a body claiming for itself the privileges of the British Lower House.

In no respect did the actual constitution of the colony differ more from that prescribed by the King's instructions than in regard to the coordinate legislative power of the Council and their duties as a court of appeal. Their judicial functions were, in theory, of two kinds; in reality, of but one. According to the royal instructions, civil cases of over £300 sterling, or of less if involving important points of law, or cases concerning the King's prerogative or revenue, might be appealed to the Governor and Council as a court of error. In similar cases involving over £500 appeal lay still further to the King in Council.[2] The judges who had given the first decision, and who were almost sure to be Councillors, might discuss but not vote on the appeal.

1 Prof. E. L. Whitney; Government of the Colony of S. C., Johns Hopkins University Studies in Historical and Political Science, Series Thirteen, I.-II., 45.

2 The amounts given above apply to the third quarter of the 18th century. At an earlier date they were £100 and £300 respectively in appeals to the Governor or to the King.

Thus every one fit to sit in a court of error was likely to be excluded.[1]

But this is mere dry parchment, more futile than Locke's Fundamental Constitutions. The chief interest is not what the King desired the constitution of South Carolina to be, but what it really was. In 1770, Lieutenant Governor Bull says, in writing to the ministry, "Application was made six or seven years ago to this jurisdiction ; but as it had never been experienced here," information was sent for to some of the northern provinces, and meantime the case was dropped ; so that, says Bull, that jurisdiction remained at that time untested.[2] Certainly no appeal was ever tried after 1770. For reasons that will appear in considering the Circuit Court Act of 1769 appeals after that went into effect were rendered more unlikely than before to occur.[3]

Thus their judical duties were actually only of a chancery character. These functions were constantly exercised by the Governor and Council as the only chancery court in the province.[4] Great inconveniences arose from the fact that the legal members, attorney general included, were often engaged as counsel in the cases it was their constitutional duty to judge.[5]

It was this mixed character, mixed in personnel

1 Pub. Rec. S. C., MS., XXXIV., 302-4, §§ 52 and 53 of Instructions; XIV., 187, §§ 71, 72, 73.

2 Pub. Rec. S. C., MS., XXXII., 375.

3 The Council Journal for 1765 contains a paper by Attorney General John Rutledge, written at the request of the Council, explaining that, in his opinion, it was the intention of the instructions that appeals should be called up by writ of error in such and such a style. Quite likely this paper was connected with the same case we have just seen cited by Lieutenant-Governor Bull. Council Jour., XXXII., 507-12.

4 Council Jour. S. C., MS., XXXVIII., 210; Pub. Rec. S. C., MS., any Governor's instructions; newspaper advertisements, etc.

5 Pub. Rec. S. C., MS., XXXII., 375.

and in function, that brought upon the Council its never ceasing woes. In the later years of the royal government, its administrative duties were fast absorbing its legislative. This, coupled with the fact that George III.'s autocratic policy filled it with subservient placemen, holders of the various provincial offices in his gift, makes its Journals more like the minutes of an executive board than the records of a house of the legislature. Nothing can better emphasize its unfitness to make laws for South Carolina than the following description of its condition on the 19th of December, 1774:[1]

William Bull, Lieutenant-Governor.

Sir Egerton Leigh, Attorney General; absent in England five months.

Daniel Blake; absent in England over two years.

John Burn; ditto.

Thomas Skottowe, Secretary.

Thomas Knox Gordon, Chief Justice; absent on circuit nearly ten weeks in the year.

W. H. Drayton; a South Carolinian, who was later expelled for his defence of American liberty.

Bernard Elliott; South Carolinian, who resigned when the agitation against the mother country grew strong, in 1775.

Thomas Irvin, Receiver General of His Majesty's Quit Rents.

John Stuart, Superintendent of Indian affairs; "an ambulatory Councillor."

John Drayton is temporarily ignored, as he never attended, being very old. There were thus two vacancies.

1 Pub. Rec. S. C., MS., XXXIII., 228; XXXVI., 279.

CHAPTER V.

The Courts Before 1769.

The equity court has been treated above, in connection with the Council. The further judicial system of the colony before 1769 was organized as follows:

I. The King in Council.

II. The Governor and Council.

III. Court of common pleas and general sessions.

IV. Justices of the peace.

V. Courts for the trial of slaves and other persons of color.

VI. Ordinary.

I. and II. were never used in South Carolina. They have been described above at pp. 18–19.

III. Until 1769, or more properly 1772, there was but one court of general sessions and common pleas in South Carolina; this met only in Charleston. Much of the time it was presided over by the chief justice alone. Four assistant judges were allowed, though much of the time none, or almost none, existed. In 1765 there was a chief justice and one assistant, or associate judge; from 1766 on there was a full bench.[1]

All the judges sat on the same bench and had an equal voice. The complete control of the court which this gave the assistant judges, who were before 1772 generally if not always South Carolinians, and the way in which they used it in controverting the Stamp Act

1 Com. Jour. S. C., MS., XXXVII., pt. II., 97; Pub. Rec. S. C., MS., XXXI., 99.

led Governor Lord Montagu to recommend that some steps be taken to curb their growing power and increase that of the chief.[1] A robe and a wig could not change Englishmen from Englishmen and South Carolinians from South Carolinians; so we may expect to find violent altercations and outright squabbles among the high priests in justice's own temple.

The chief justice was nearly always an imported Englishman. The native South Carolinians who filled the position of assistant before the Act of 1769 went into effect were generally not bred to the law, but, says Lieutenant Governor Bull, were gentlemen recommended solely by their integrity and common sense. We can understand how a trained English barrister, striving to uphold the royal prerogative by the letter of the law, and four South Carolinians equally determined to maintain colonial liberties by common sense, would often clash.

IV. In the period under consideration we find the term "justice of the peace and quorum." In some commissions the words "and quorum" did not appear. The difference was that for certain purposes a justice of the peace and quorum was required, and that a justice simply of the quorum exercised notorial rather than judicial duties. The distinction is no longer made.

From the settlement of the colony justices of the peace were important officials, because of their special jurisdiction over slaves and persons of color, and because of the lack of courts of superior jurisdiction outside Charleston. The Assembly was constantly striving to make them as effective and as useful to the colony as possible.

[1] Pub. Rec. S. C., MS., XXXI., 86.

In 1765 the jurisdiction of justices of the peace in civil cases extended to £20 currency.[1] The changes of detail are too numerous to specify.

A point of importance is that two justices, one being of the quorum, might grant habeas corpus.[2] They could also grant bail in may cases.[3]

Slaves and "servants" being maltreated or neglected might complain to a justice of the peace, who, sometimes alone, sometimes with two freeholders, had authority to warn the master or overseer, and on a second offence to punish.[4]

The Governor, acting for the King, appointed justices of the peace during pleasure, and on the advice of the Council suspended them for due cause. Yet the Assembly made all laws by which they were governed.

The jurisdiction of justices of the peace was confined to their own district or county. In 1765 there were 250 justices.[5] Further matter of importance regarding these officers is found under the next head.

V. So early as 1690 we find Seth Sothel's name affixed to a law for establishing courts to try slaves. There were no juries, no records, and no report to any authority. Two magistrates and three freeholders had absolute and final jurisdiction. The owner was compensated for the loss from execution of his human property. This system continued as the method for the trial of slaves until the Civil War.

In 1740 the freeholders were fixed at not less than three nor more than five.[6] Trial was summary, and

1 Statutes at Large of S. C., III., 268.
2 Statutes at Large of S. C., II., 400.
3 Ib., II., 452, 482.
4 Ib., III., 17.
5 S. C. Gaz., Oct. 1931, 1765.
6 Statutes at Large of S. C., VII., 345, 400.

execution of sentence without delay or appeal.

One magistrate and two freeholders could form a court for the trial of offences whose punishment did not extend to loss of life or member. Prescribing punishments less than death was in the power of the judges.

VI. Some notice may be inserted here of the court of probate, or ordinary, as it was called. Until 1799 there was in South Carolina but one ordinary. His office was in Charleston.[1]

The government of the colony of South Carolina was more defective in the organization of its judiciary than in any other respect. For this reason the formation of a proper system was afterwards found to be the most perplexing constitutional problem of the early years of statehood.

Such an epoch making change, involving so much before and after it in South Carolina history, took place in the court system with the Act of 1769 that a separate chapter must be given to that Act, the causes which produced it, and the place which it occupies in the development of the State.

1 Statutes at Large of S. C., VII., 294.

CHAPTER VI.

Regulators, and the Circuit Court Act of 1769.

In a day of no railways, when the greater part of South Carolina was an almost roadless wilderness, to have but one court, and that in distant Charleston, left most of the province largely deprived of the administration of justice. During the second quarter of the 18th century, the back country began to swarm with immigrants. The ever increasing tide, southward from Pennsylvania and the intervening colonies along the mountain walls, and across the sea through Charleston, together with the natural growth of a very fecund population, gave the back country, even before the Revolution, as compared with the low country, a majority. By 1790 this amounted to four to one. In 1769 the balance was about even or had already turned.[1]

In this back country was building the future yeomanry of the commonwealth; there were coming to importance the families who were to form a newer aristocracy, whose names now appear extensively in the nomenclature of the counties of the State. These people were to take their first share in the overt history of their country in the Revolution, and were finally to capture and rule the commonwealth, in spite of the oligarchic coast element which kept them so long unrecognized. There was much that was noble in this young

1 Pub. Rec. S. C., MS., XXXII., 122.

society; but as in all new communities, there was much that was bad. This was aggravated by the fact that under the system of centralization which prevailed in South Carolina, the back countrymen could not take a part of the government with them as in states where every local group is an automatic governmental unit. Population had run ahead of government.

In 1767 one hundred and fifty, or some said even fifteen hundred men had bound themselves into a league to defy the law.[1] These had their places of rendezvous, where they concocted their depredations, and when attacked gathered in such numbers as to defy the weak arm of justices of the peace and deputy sheriffs. When the provost marshal, the militia, the British regulars, and the *posse commitatus* marched out to bag a gang of outlaws, it was like the meeting of two small armies.[2]

Since the magistrates could not, and the King's court in Charleston either would not or could not protect them against such villians, said the back countrymen, the good citizens combined into companies called "regulators." The regulators succeeded to a great extent in suppressing the lawless element. Violence and riots, however, continued to occur; for about a year and a half before the fall of 1768 they were especially tumultuous.[3] In the eye of the law the regulators were of course always outlaws. Suits were brought by persons whom they had whipped; but the whippers refused to be arrested. Deputy sheriffs riding out to arrest them were themselves liable to be captured and

1 Pub. Rec. S. C., MS., XXXI., 422.

2 Pub. Rec. S. C., MS., Vol. III. of the extra numbers including the lost Journals, 596, 638.

3 Pub. Rec. S. C., MS., XXXII., 36 et sq.

sentenced by the regulator "courts" to be chastised.[1]

As early as 1754, and perhaps before, the back countrymen were sending in petitions for courts and for the redress of other grievances that they continued to mourn under until after the Revolution.[2] The grand jury of the province took it up. At least as early as 1765 Lieutenant Governor Bull recommended that courts be established in the back country. The Commons were willing. A proposition to establish county and precinct courts was defeated, but they voted to establish circuit courts. These were to be instituted at four places: in Granville and Craven counties, and at Congarees and Waterees. On March the 28th this bill passed the second reading and by a vote of 16 to 15 was sent to the Council.[3]

As before remarked, the Council Journal for this period is an administrative record book. Only rarely does it make mention of anything legislative. No allusion is found there to this Act. It never came back to the Commons for a third reading, and the inference is that it met its death in the other body.

In 1766 the Commons again appointed a committee to draft another bill.[4] But not until April 12, 1768, did such an act run the triple gauntlet of Commons, Council and Governor; and then a fourth power was ready to strike it dead at the goal. The King forbad.

Great was the chagrin at this unexpected rebuff,

1 E. g., Council Jour. S. C., MS., XXXIV., 118, 189 et sq., 219 et sq., also XXXII., 36 et sq.

2 Pub. Rec. S. C., MS., XXVI., 119; Com. Jour. S. C., MS., XXXVIII., 30.

3 Com. Jour. S. C., MS., XXXVII., pt. I., 3, 31, 71. It was common till long after the Revolution to send a bill from one House to the other after a second reading. If passed in the second House, it was returned to the first for a third reading.

4 Com. Jour. S. C., MS., XXXVII., pt. II., 237; XXXVIII., 11.

involving the peace of nearly the whole province and the well-being of all. The disorders in the back country had subsided in expectation of relief, and now were they again to be thrown indefinitely into anarchy?[1] The Assembly reenacted their court bill, and on July 22, 1769, the whole Commons House carried it to the Governor and desired him to sign. Governor Lord Montagu replied that his instructions made it impossible; he was very sorry; he was sick; he would soon be sailing for England, where he would do all in his power in their interests.

The Commons were surprised; they were hurt; they talked of "anarchy" and "ruin." Four thousand back countrymen were threatening to come a hundred and fifty miles and capture the polls and force a due attention to their claims.[2]

We remember the steady policy of the King to force the colonies to settle fixed salaries attached to the royal offices. A salary law once passed, his appointees would be safe; a proper use of the prerogative of prorogation and a subservient Council might forever prevent its repeal. But under the system of giving each officer individually a certain amount each year, prorogation meant no pay; for no continuous salary law provided a steady stream of cash. But here at last Majesty had Commons upon the hip. The Governor sorrowfully informed the House that he was imperatively forbidden to sign any Act that did not leave to the King the appointment of sheriffs through the Governor and Council and attach regular salaries to the offices, and not to the particular persons, of attorney-general and clerk of court.[3]

1 Com. Jour. S. C., MS., XXXVII., pt. II., 698.
2 Pub. Rec. S. C., MS., XXX., 122.
3 Com. Jour. S. C., XXXVIII., 74, 78.

And then to allow a quiet digestion of this lump, the Governor issued his proclamation proroguing the Assembly for half a day. In the morning came a polite message explaining the prorogation and desiring the House to frame another bill, free from those objections. The House proceeded to try again. On July 29, 1769, was passed the Act which, obviating except in one particular the King's objections, was able on the 29th of November following to obtain the royal approval. On February 21, 1770, the King's assent was announced, the House set the printing press to work turning out the money, and work was at once commenced on the court houses and jails.[1] On May 19, 1772, Lieutenant Governor Bull issued his proclamation that all was ready for the law to go into effect; on May 30 the judges appointed the sheriffs, and in November, 1772, was held the first court of common pleas and general sessions ever convened in South Carolina outside the city of Charleston.[2]

Pari passu with the Circuit Court Act went the reform of the shrievalty. There had been one provost marshal for the whole province, a capital grievance, which the Commons carried to the very foot of the throne. The officer was a royal patentee and the office was personal property, transmitted, sold or gambled

1 Com. Jour. S. C., MS., XXXVIII., 274; Council Jour., MS., XXXV., 29.

2 S. C. Gaz., May 28, 1772; Dec. 10, 1772. In the Statues at Large of S. C., in ten volumes, the first part edited by Dr. Thos. Cooper, the latter by Dr. David J. McCord, this law, which occurs at VII., 203, is dated by Dr. McCord April 12, 1768. The history of the Act as recounted above shows the mistake of this. The act of 1768 was vetoed by the King. The Act given by Dr. McCord is the one passed in 1769 and approved by the King, for it conforms to the royal requirements, except that not the Governor, but the judges, themselves royal appointees, should appoint the sheriffs. Judge Brevard in his sketch of the legislative history of South Carolina gives 1769 as the date of the Act. He is quoted at length in the prefatory portion of the Statutes at Large, I., 431. This volume is edited by Dr. Cooper.

with under certain limitations.[1] The holder at this time was Richard Cumberland, who had never been in South Carolina, and who exercised his lucrative sinecure through Roger Pinckney, his deputy.[2] In 1768 the Assembly appropriated £35,000 currency, equal to £5,000 sterling, to recompense Mr. Cumberland for the abolition of his office, the money to be paid when the King should assent to the Circuit Court Act. Thus like mediaeval burghers did the South Carolinians buy this liberty.[3]

The Circuit Court Act of 1769 divided the province into seven districts, in each of which the common pleas and general sessions were held twice a year, except in Charleston, where they were held three times. Each district had its own sheriff, a resident within its bounds, who was appointed by the judges. Under the permission granted the judges to make reasonable rules, they divided the six districts out of Charleston into two circuits and apportioned them among themselves. Camden, Cheraws and Georgetown were called the Northern Circuit; Orangeburg, Ninety-Six and Beaufort, the Southern.[4] Two judges rode each circuit; often two sat on the same bench.

All seven courts were of like jurisdiction and power. Yet a distinction was given to that in the capital; in civil causes all writs and process issued from and were returnable to the court of common pleas in Charleston through the sheriff of the district concerned, and all proceedings were conducted in that court until issue was joined. The actual trying of the case was then con-

1 Pub. Rec. S. C., XXVIII., 195, 197.
2 Pub. Rec. S. C., MS., XXX., 124; XXXI., 236, 251.
3 Com. Jour. S. C., MS., XXXVII., pt. II., 661, 675.
4 S. C. Gaz., Dec. 10, 1772; Dec. 20, 1773.

ducted in the district in which it arose.[1] In 1769 this promised to be convenient for the judges, and moreover the fees poured into Charleston. The practice was found to be such a hardship that in 1789 it was abolished and every court was given complete control of its own writs and process.[2]

The importance of the Act of 1769 was threefold. First, it was the greatest step that had ever been taken for the elevation of the back country. Almost immediately the Lieutenant Governor wrote to England that a wonderful improvement had been wrought in the life of the people. Second, it drew the up country and the low country together. Lawyers and judges returning from the first circuit expressed themselves as amazed at what they had learned of these up countrymen, who, they said, would with proper advantages make as fine a population as any upon earth.[3] Third, it was really the first governmental organization of that larger part of the province outside the old parishes. The seven judicial districts were the basis of all later subdivisions. Thus this measure was the parent of all administration of government in the greater part of South Carolina; and when, in the fulfilment of an ideal republicanism, a politically educated people manage the whole of their local affairs in townships, the completed system must look back to the act of 1769 as its first ancestor.

1 Statutes at Large of S. C., VII., 200.
2 Statutes at Large of S. C., VII., 253.
3 S. C. Gaz., Dec. 10, 1772.

CHAPTER VII.

The Stamp Act.

The latent determination of the people of South Carolina to resist even the authority of Parliament if that authority touched upon their rights was first brought to expression in the resistance to the Stamp Act. This chapter in the history is so different from all else treated of in the present study, except in the underlying principle of the assertion of the right to be self-governed, that to insert it in chronological order among the events which are next to occupy our attention would break the continuity of development in the consideration of the purely internal history. The Stamp Act agitation serves morever more satisfactorily than any other event to exhibit in action the government whose outlines we have sketched.

South Carolina was driven by England from her attachment to the mother country. The Stamp Act precipitated the struggle which in one short decade was to eventuate in the most sincere devotion to the parent state being supplanted by an irreconcilable antagonism.

The Stamp Act was to go into effect on November 1, 1765. On October 18 the ship bearing the stamps and stamped paper arrived in Charleston harbor. The provincial press had for weeks been full of agitation against the law. Such a state of hostility was manifest in the public mind that Lieutenant Governor Bull secured the papers in Fort Johnson and strengthened the

garrison. In Charleston popular feeling began its visible demonstrations on the morning after the arrival of the stamps, when effigies and threatening placards appeared at the most conspicuous places in the city.

Processions, concourses, manifestoes, threats against the stamp officers, continued for nine days. These gentlemen had taken refuge in the fort, under the same protection as the detested stamps. The continued demonstrations awed the officers into submission, and on Sunday evening, October 27, a renunciation by them of their positions was read to the assembled populace. It was greeted with long continued shouting and the ringing of the bells unmuffled for the first time since the 18th.

On the next morning, Monday the 28th, St. Michael's great steeple was again jubilant and chimed as for a holiday. A number of citizens went to the fort and returned with the stamp officers, Messrs. Saxby and Lloyd. At noon they landed from a boat bearing in its bow a "union flag" with laurel on the staff, and in the centre, "Liberty." At the wharf were gathered seven thousand people, it was estimated, the largest concourse ever assembled in the province. There was read a new and most explicit declaration signed and sealed by Lloyd and Saxby not to exercise any duties of stamp officers nor to aid or countenance such exercise by any other person until Parliament had acted on the united petition of all America. At this, the people shouted and reshouted; the bells rang; hautboys, drums and violins sounded; the ships displayed their colors and the cannon boomed.

That night the streets were patrolled for the protection of the persons and property of the two obnoxious officials; but the people, their object accomplished,

desired no violence.[1]

The part played by the unorganized populace must not be underestimated. It was this inflexible and all but universal determination to prevent, even by unlawful violence, the execution of the Act which made possible the splendid stand taken by the Commons House of Assembly and the successful and revolutionary course of the court of common pleas in rendering the law nugatory. In all reason, the state of the popular mind should be considered first, as the dynamic source from which all the other organs derived their power.

Lieutenant-Governor Bull expressed to the ministry his apprehension that the Assembly would take measures repugnant to the Parliament of Great Britian. In this he was no bad prophet, as "certain resolutions declaratory of what they conceived to be their rights with regard to taxation in America" abundantly proved. In vain hopes, the Lieutenant-Governor ordered a dissolution; but a new election returned the same old leaders. Dissolutions never helped the royal cause.

South Carolina was one of the nine colonies represented in the Stamp Act Congress at New York in October, 1765. When the Assembly met on November 25, the first four days were devoted to the report of the returned delegates, who were thanked "for the services they had done their country."[2] On the 29th the House appointed Christopher Gadsden, Charles Pinckney, John Rutledge, James Parsons and Thomas Wright a com-

1 S. C. Gaz., Oct. 19-31, 1765. Not only is there no foundation for the tradition published in several places that Ft. Johnson was captured and the stamps immediately sent back to England as an alternative to burning them, but the contemporary newspaper accounts, the official correspondence of Lieutenant-Governor Bull, the reports of Chief Justice Skinner, the records of the Court of Common Pleas, all very full, contradict the possibility of such a thing.

2 Com. Jour. S. C., MS., XXXVII., pt. II., 15, et sq.

mittee to draft suitable resolutions. Their report, made and adopted that same day, forms a bill of rights so noble in logic and conception, as it moves with redoubled strength from hight to hight, that it must ever have a place in the constitutional history of South Carolina:

"This House, sincerely devoted, with the warmest sentiments of devotion and duty, to His Majesty's person and government, inviolably attached to the present happy establishment of the Protestant succession, and with minds deeply impressed by a sense of the present and impending misfortunes of the people of this province, esteem it their indispensable duty to their constituents, to themselves, and to posterity, to come to the following resolutions respecting their most essential rights and liberties, and the grievances under which they labor by reason of several late acts of Parliament.

"1st. Resolved, That His Majesty's subjects in this province owe the same allegiance to the crown of Great Britian as is due from his subjects born there.

"2d. That His Majesty's subjects in this province are entitled to all inherent rights and liberties of his natural born subjects within the kingdom of Great Britian.

"3d. That the inhabitants of this province appear also to be confirmed in all the rights aforementioned, not only by their charter, but by an Act of Parliament of the 13th George II.

"4th. That it is inseparably essential to the freedom of the people and the undoubted right of Englishmen, that no taxes be imposed upon them but with their consent given personally or by their representatives.

"5th. That the people of this province are not and from their local circumstances cannot be represented in the House of Commons of Great Britian, and further

that in the opinion of this House the several powers of legislation in America were constituted in some measure upon the apprehension of this impracticability.

"6th. That the only representatives of the people of this province are persons chosen therein by themselves, and that no taxes ever have been, or can be, constitutionally imposed upon them, but by the legislature of this province.

"7th. That all supplies to the crown being free gifts of the people, it is unreasonable and inconsistent with the principles of the British constitution for the people of Great Britian to grant to His Majesty the property of the people of this province.

"8th. That trial by jury is the inherent and invaluable right of every British subject in this province.

"9th. That the late Act of Parliament entitled 'An Act for granting and applying certain stamp duties and other duties on the British colonies and plantations in America, etc.,' by imposing taxes on the inhabitants of this province, and the said Act and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the people of this province.

. . . . . .

"18th. That it is the right of the British subjects in this province to petition the King or either House of Parliament.

"Ordered that these votes and resolutions be signed by the Speaker and printed and made public, that a just sense of liberty and the firm sentiments of the loyalty of the representatives of the people of this province

may be known to their constituents and transmitted to posterity."[1]

Note the calm, irrefragible logic, strengthening the position with each advance, until the climax in numbers 6 and 7. The first two resolutions are astute. Number 1 lays it down that the South Carolinians owe the same allegiance to the King as natural born subjects in Great Britian; number 2 claims as a necessary consequence all the rights of those native born Englishmen. The committee that presented these resolutions contained three men of national reputation in the Revolutionary period; a bill of rights three of whose five framers were Christopher Gadsden, Charles Pinckney and John Rutledge is no insignificant document.

The Stamp Act early got into the courts in South Carolina. The struggle there was intensified, because the royal and home rule elements in the provincial government met there on the same plane and in perfect antagonism. On November 13, 1765, Chief Justice Skinner,[2] who since his arrival from England had presided alone, ordered that without stamps no legal business could be done, and adjourned the court. In this court, however, was to be fought the best strategic battle of the constitutional struggle.

Riots, insults and threats against royal officers continued. It became unsafe for anyone who failed to join the demonstrations, or to at least give tacit approval. Chief Justice Skinner opposed a bolder front to the pop-

1 Com. Jour. S. C., MS., XXXVII., pt. II., 2631.

2 Judge O'Neal, in his "Bench and Bar of S. C.," spells this name "Shinner," and says he so finds it in the court records. Those records are not now in existence, except such extracts as are found in other documents. The Public Records of S. C., copied in England, and the Commons House and the Council Journals, all manuscript, uniformly spell it "Skinner."

ular fury than all the rest of the government combined. He was violent and implacable to carry out the Stamp Act so far as lay in the power of a single man. Against him, indignation was trebly strong. Demonstrations and turbulent assemblies about his house became so serious that his family slept with arms at their beds.

The stamps lay in Ft. Johnson and none dared touch them. The South Carolina newspapers appeared as usual on plain paper with the words in large letters across the top, "No STAMPED PAPER to be had." Business was congested. "Though (their interest) is greatly affected by it," wrote Lieutenant Governor Bull to the Lords of Trade, "that inconvenience is submitted to however with great perseverance and constancy. The courts of common law, admiralty and ecclesiastical jurisdiction are all silent; no grants of land are passed; all the ships remain in the harbor as under an embargo; every transaction requiring stamps is at an end."[1]

The harbor of Charleston was a trap into which ships entered but could obtain no clearance papers to get out. By February, 1766, sailors had accumulated to the number of fourteen hundred, about one-fourth the normal population of the town. In December, 1765, Lieutenant Governor Bull allowed a ship to clear without stamped papers to take food to the troops. The people seized on this, and demanded so tumultuously the same privilege for every ship that violence was imminent. The first sheep had jumped, and all must follow. The forbearing Lieutenant-Governor, loyal Tory though he was, conceded that captains might leave without formal clearance papers, but with a "permit," for which

1 Bull to the Board of Trade, Pub. Rec. S. C., MS., XXX., 299.

they paid the same amount that stamps on clearance papers would have cost.[1]

Dammed up popular feeling is like dammed up waters; an outlet may relieve the pressure, or it may be but an opening for tearing every obstacle to destruction. The latter was now the case. Lawyers, merchants and populace determined that, Skinner and the Parliament to the contrary notwithstanding, the courts must act. Chief Justice Skinner had on November 13, 1765, declared that no business could be done without stamps, and therefore adjourned court to March 3, 1766. The gentlemen of the bar waited upon his Honor and desired to present a petition praying that business might be conducted with ordinary unstamped paper. This petition was, perhaps, one degree bolder in its assertion of American liberty than any other utterance in South Carolina. The lawyers now, as on many noteworthy occasions in the history of England and America, vindicated their title to a place among the foremost leaders and boldest champions of constitutional liberty. We "have ever thought," they say, "the principal excellency of the British constitution consists in the subject's not being bound by any law to which he himself doth not consent by his representative." We claim our rights, they continue, under "Magna Charta, the Petition of Right, etc., . . . which were made of force here by Act of our Assembly. . . . We cannot think ourselves bound by the Stamp Act, which annihilates our natural as well as constitutional rights."[2]

But learning that there was no hope of the judge's

1 Bull to the ministry, Feb. 6, 1766; Pub. Rec. S. C., MS., XXXI, 23-25.
2 Pub. Rec. S. C., MS., XXXI., 225.

granting their petition, they hit upon a strategy. In 1765 the bench of common pleas and general sessions in South Carolina consisted practically of Chief Justice Charles Skinner. Four assistant judges were allowed, but only one was in commission, Robert Pringle, who scarcely ever appeared in court. Two, four and five days respectively before the 3d of March, 1766, the appointment was secured from the Lieutenant Governor of three assistant judges. These were sworn in secretly, without the knowledge of Judge Skinner. When, on the morning of the 3d of March, the Chief Justice walked into the court with his opinion snugly prepared, like a loaded bombshell that would shatter the last charge of the enemy, he was astonished to see Messrs. Rawlins Lowndes, Daniel Doyley, Benjamin Smith and Robert Pringle take their seats beside him. "I knew how it would go with me," he says. From that moment the assistants became the digits and the chief justice the cipher, adding importance to the whole, doubtless, but individually having no significance whatever.

Mr. Bee, attorney for the plaintiff in Jordan vs. Law, moved for judgment by default, as the defendant had not appeared. Questions arising, a division of the bench was observed in the uniform proportion of one to four, Mr. Chief Justice in the minority maintaining a lonesome isolation. All the leading lawyers spoke in favor of proceeding without stamped paper. A petition from almost one hundred Charleston merchants urged earnestly the same prayer, as their prosperity was being ruined.

The court reserved its opinion and adjurned to April 1. On that day the decision was rendered. The court decided that, since it was against Magna Charta

to deny or delay justice, as it was impossible to obtain stamps, business should proceed on plain paper despite the Act of Parliament. The clerk was therefore ordered to issue judgment. But this official refused, and drew down upon himself immense judicial thunders in a petition for removal, and a lightning stroke of a fine of £100 proclamation money. He feared to violate an Act of Parliament that launched special penalties against clerks of court in particular who should dare to disobey its provisions. But the Lieutenant Governor declined to suspend Mr. Campbell, and Majesty graciously remitted his fine.

As Campbell refused to issue papers, Mr. William Mason was appointed by the court as clerk *pro tempore*. He feared not the King and Parliament.

Chief Justice Skinner read a contrary opinion and handed it to the clerk to be entered in the records of the court ; but the assistant justices refused to allow it to be recorded.[1]

There are two decisions during this period that have an important bearing on the function of the courts to judge Acts of the legislature by a supreme written constitution. One is the opinion rendered by the attorney general of England, William de Grey, in the £10,500 matter, regarding the right of the Commons House of Assembly by its sole vote to appropriate money ; the other is the judgment of the common pleas court of South Carolina on the Stamp Act. The former will come up in its place. Let us see now how these South Carolina judges came very near formally annulling an Act of Parliament.

Chief Justice Skinner held that the Court had no

1 Pub. Rec. S. C., MS., XXXI., 106, 144 ; Council Jour. MS., XXXII., 739-50.

power to question the authority of an Act of Parliament, and that the plea of impossibility to get stamps was specious, since it was wholly impossible simply by the unlawful demonstrations of the people; it was a principle of law, he said, that no man should derive benefit from his own offense.[1]

The assistant judges considered that certain parts of Skinner's opinion implied reflections upon them ; they therefore at the next sitting of the court, May 13, delivered through Mr. Justice Lowndes a long argument in defence of their decision. There will be observed as the groundwork of this paper an ingenious misapplication of a principle of judicial interpretation of the common law courts of England—i. e. the principle which Otis sought to warp and extend in his argument against writs of assistance, that an act of Parliament which is in the nature of the case unreasonable or impossible of application does not bind the courts.

Judge Lowndes maintained that since the stamp distributor had forsaken his office, it was impossible to obtain stamps. But the law neither requires impossibilities, nor seeks to punish the innocent by closing courts and other public offices for the dereliction of an official. Moreover, the object of the Act was to raise a revenue, and not to stop courts. To do the latter because of the impossibility of obtaining stamps would in no sense be carrying out the intention of the Act.

The court went on to show that there are many instances in which the operation of a law might be suspended ; e. g., by the 1st Edward II., breaking from prison is a felony ; but if the prison be on fire, it is no felony for the prisoners to break out. If a tailor, e. g.,

1 Pub. Rec. S. C., MS., XXX., 54, 109; Council Jour., MS., XXXII., 745.

is ordered to make a coat, he rests under no obligation to make it until he has been furnished with the cloth. So this court is under no obligation to use the stamps so long as the proper official refuses to furnish them. Mr. Chief Justice maintains that it is no "act of God" that makes the obtaining of stamps impossible. It certainly is an act of God that all America is united in its determination not to pay the stamp tax!

All the business of the court was now carried on by the assistant judges, and to them went all the fees. Skinner writes that he was reduced to a French half crown and eighteen pence English silver. He bought the necessaries of life on credit. Every man to whom he owed a bill seemed to make a run upon him.

On May 3, 1766, unofficial information arrived that the Stamp Act was repealed. Popular demonstrations were renewed, now not of sorrow, but of joy. On May 5, two days after the news, "the mob," says Skinner, declared that they would insult any house not illuminated that night in their grand demonstration. Skinner was alarmed. His house was illuminated as a matter of necessary precaution, and his only discomfort was that "he was saluted between the hours of nine and ten o'clock with cheers and huzzas and damns."

All the other King's servants, glad of an excuse, seized upon the news of May 3d and opened their offices of admiralty, chancery, etc. But not so Skinner. He had only contempt for those who sought such loopholes to escape the popular fury and yet not offend the King.

On July 1, 1766, Skinner announced in court that he had received such information as satisfied him of the repeal of the Stamp Act, and that he was ready to proceed to business. The assistant judges refused to allow

his paper to be recorded.[1] Similarly the Chief Justice's order rescinding his order of November 13 closing the court was denied entry upon the book, since it would have admitted the validity of the original order.[2]

Two of the King's servants requiring a word of comment are Chief Justice Skinner and Lieutenant Governor Bull. The Chief Justice, deprived of his income, the most hated man in the province, and his personal safety threatened, was yet perfectly unyielding in what he conceived his duty. Violent and dictatorial though he was, yet in this matter loyalty to his master and determination to preserve the British constitution as he understood it controlled his acts. He is a type of the Englishman sent over to maintain the royal prerogative.[3]

To judge of the position of Lieutenant Governor Bull is less easy. Skinner was an Englishman and acted dogmatically as an Englishman throughout. Bull's position was one of weightier responsibility. Momentous consequences depended upon whether he conducted himself with fanaticism or with prudence. Besides, he was a native of South Carolina. We must consider how far his official duty to the King laid him under uncompromisable moral obligation to do everything in his power to secure the execution of the Stamp Act; how far wise compromise could go without becoming unfaithfulness to his master; how far sympathy with his neighbors might justly influence him; and how far he might look with complaisance upon the overthrow of a law unwise and

1 Pub. Rec. S. C., MS., XXXI., 171-6.

2 Ib., 256.

3 On the address of the Commons House of Assembly, Governor Lord Montagu, with the advice of the Council, suspended Skinner in 1768, for ignorance of the law and arbitrary conduct. He died while final investigation was pending. (Com. Jour. S. C., MS., XXXVII., pt. II., 35; Pub. Rec. S. C., MS., XXXII., 7.)

bad in every particular, violating his own rights as a citizen and as a man and those of his fellow-countrymen. He saved the stamps from destruction and conformed in his own duties to the law. He refused to suspend Dugal Campbell. But he appointed the three judges who he doubtless knew were enemies to the Act, and he furnished the official certification on which they based their decision, simply that "there were no stamps to be had." He failed to do all he could have done as royal Lieutenant-Governor to carry out the law. Tory though he was in the Revolution, yet in 1766 he gave a great foothold to the colonists in opposing the Stamp Act. All his utterances were characterized by the greatest prudence, his acts sometimes by firmness and sometimes by conciliation. Had some violent Englishman been at the helm, the royal government would have been steered much less safely through the storm.

The people of South Carolina yielded not one jot or tittle in the contest, unless allowing ships to pay for "permits" be so considered. Says Lieutenant Governor Bull, they considered that they were not only resisting a burdensome tax, but were contesting for a principle for the future.[1] They blockaded and practically destroyed the stamps; they captured the courts and annihilated there the authority of the crown, and they uttered a bill of rights which, with those of sister colonies, formed the prelude to the Declaration of Independence.

As a mark of their gratitude to the great English champion of American liberty, the Commons House of Assembly in May, 1766, voted £5,000 sterling for a marble statue of William Pitt for his exertions for the repeal.[2]

1 Pub. Rec. S. C., MS., XXXI., 59.
2 Com. Jour., S. C., MS., XXXVII., pt. II., 121, 171, 198, 209.

This togated figure still stands—now in Washington Square—less its right arm by a British cannon in 1780. The gun burst; tradition says with the monstrous shot that broke the arm of Pitt.

I have gone beyond the strict requirements of constitutional history in treating the Stamp Act; but it has been to give a view of how the royal and democratic elements in the government were related; how the people contrived to circumvent what they could not prevent; how they strove to control and punish their oppressors—in short, to give a picture of the province of South Carolina in action.

CHAPTER VIII.

Relations of Commons and Council from 1725 to 1765.

In the opposition to the Stamp Act, the determination of the people of South Carolina to be self-governed burst forth overpoweringly, in the terrorizings of the mob, in the resolutions of the Commons House of Assembly, and in the annihilation of the authority of the crown in the common law courts by the assistant judges. But the sentiment of home rule was no new one. The Stamp Act was two things: first, it was a very important incident in a long course of development; and second, it did not leave the development where it found it, but gave it an immense advance. Oppression came just at the stage of the colony's history when oppression could least be brooked.

The legislature of South Carolina consisted of two elements distributed among three parties: first, the purely home rule element, in the Commons House of Assembly; second, the purely royal element, in the King-appointed Governor; and third, a compromise between these two elements in a body to whom the interests of the province would appeal as natives and the interests of the King as champions of the prerogative—the Council.

There was a slow revolution going on in the govment of South Carolina; a revolution purely domestic in its field of operation, though reaching across the sea in its relationships; different from the American Revolution, but born of the same spirit; a slow process of change, which, but for the greater and more startling one, would have completed itself in the same theatre in which it began.

By the formal constitution of the province of South Carolina, that is the royal instructions to Governors, there was but one way in which money could be paid out of the treasury—by the vote of both Commons and Council and the concurrence of the Governor. In dealing with money bills, as in all other particulars, the two bodies were given exactly similar privileges. The Council, however, never went so far as to originate a money bill. For some time this plan went on smoothly. In the early years of the royal government the Council was composed almost or quite entirely of native South Carolinians, and seats were sought as an honor by the best citizens.[1] There appeared no great reason to apprehend danger to the liberties of the people from the upper house, as it was then called, made up, as it was, of the most respected men in the province. Those were the days when Thomas Broughton might be indifferently Speaker of the Commons House of Assembly or a member of His Majesty's Council. The two houses of the Legislature—for at that time they were properly two houses—audited the public accounts by joint committee, and made the estimates and framed the tax bill in perfect equality. Either offered amendments as a matter of course. The terms Upper and Lower House were

1 Pub. Rec. S. C., MS., XIV., 148; XXII., 160; XXXVI., 162, etc.

constantly used by both Houses in speaking of themselves and of each other.[1]

But even so early as 1725 the Commons House of Assembly began to measure it privileges by those of the British House of Commons. In that year the right of the Council to amend or change money bills was totally denied by the other branch of the legislature. Surely, they say, the King did not intend the Council to have more power than the English House of Peers. The dispute waxed high and was ended by the aggressive Commons being knocked into limbo by a dissolution.[2]

In 1735 occurred the next clash. Suggestions, messages, recommendations, and formal amendments to the tax bill continued up to the very moment of collision.[3] Who could cast a stone at a patriotic "Upper House" that sent down a warm recommendation to reimburse a South Carolinian who had spent his substance in London frustrating the designs of the greedy Lords Proprietors to regain possession of their lost Carolina? The memories of 1719-1729 still drew the Houses together.

The shock was startling. In the days of February and March, 1735, are strewn over the pages of the Com-

1 In the earlier years of the royal government the bill to raise the funds to meet the expenses was passed at the beginning of the year whose expenses were being provided for. Each House appointed members of a joint committee, who estimated what amounts would be necessary. The Commons framed the tax bill in blank, and filled out the amounts after the report of the joint committee.

At a later date, it became customary to frame the tax and supply bill at the end of the year whose expenses were being provided for. This method attained more accurate results, since the bill was framed, not to meet what it was estimated the expenses would be, but what it was discovered they had been. The joint committee now inspected all claims against the government for the past year for salaries, administration, extraordinary expenses, etc., and audited these accounts. When the gross amount was arrived at, the blanks in the tax bill were filled.

The system of providing revenue for the past, instead of for the coming year, continued to the Revolution.

2 Com. Jour. S. C., MS., VII., 320, 333, etc.; Pub. Rec. S. C., MS., XI., 361.

3 E. g., Com. Jour. S. C., 1734, XI., 17, 64, 67, 70, 107, 109, etc.; Council Jour. S. C., MS., V., 534, 543, 640, etc.

mons Journal grumblings that the Upper House was keeping the tax bill altogether too long. The Council grumbled back. Evidently there was to be trouble. It so happened that Chief Justice Robert Wright had incurred the enmity of the Commons House of Assembly, and for three years they had withheld his pay. Now this Robert Wright was a member of the Council.[1] In the tax bill of 1735 the Commons also provided that their clerk should receive twice the amount allowed the clerk of the Upper House. When the tax bill went to the Council, the gross sum was £42,992, 13s., 6d.; when it was returned, the figures read, £45,092, 13s., 6d.[2] The Council did not relish the discrimination against their own clerk, and they desired to force the Commons to pay Wright his salary.

The Council had offended in two particulars: they had added £2,100 to the people's taxes, and they had attempted to wrest from the hands of the Commons their only weapon against obnoxious royal officers. The amendment was unanimously rejected (*nemine contradicente*). On the next day, March 28, 1735, the House resolved in similar *nemine contradicente* style, "That His Majesty's subjects in this province are entitled to all the liberties and privileges of Englishmen (*vide* Charter to the Lords Proprietors; *vide* Statute 31 Ed. I., Chap. 1 and 4); (and) that the Commons House of Assembly in South Carolina, by the laws of England and South Carolina, and ancient usage and custom, have all the rights and privileges pertaining to money bills that are enjoyed by the British House of Commons"; and further, that after the tax bill is closed, no addition can

1 Pub. Rec. S. C., MS., XIV., 28.
2 Com. Jour. S. C., MS., IX., 110, 126, 178, 188.

be made thereto "but by and in the Commons House of Assembly."[1]

The right to all the liberties of the inhabitants of England, and, by necessary implication, the exercise of their parliamentary practices, and not the royal instructions alone or completely, the Commons considered their constitution. Note, however, that in the earlier years of the struggle, and sometimes even towards the end, they plead the intentions of the King in justification of their claims. This was a very constitutional people; they professed to abhor revolution while constantly working it. At last they were forced to desert the plea of the King's intentions, as His Majesty declared most emphatically that he was against them. Whether the Governor and Council cited the royal instructions, or the Commons the charter and the statute extending to the colonies all the liberties of Englishmen, it was equally the archetype of the American system of a supreme written Constitution by which the acts of the various branches of government are to be tested.

At this early stage of the royal government, with the title of the Proprietors only six years dead, the movement for absolute home rule was thus far advanced. Evidently the colonists did not exchange the weaker overlordship for the stronger in order that their liberties might be curtailed.

In the battle of 1725 the Commons gained nothing, except the moral energy for the future that came from

1 Lieutenant-Governor Bull, in a very lucid sketch of the relations of the Commons and Council, written in 1770 at the direction of the Earl of Hillsborough, makes a mistake of a year and a half in the date of this clash, and also is in error in saying that it was the first. But his sketch is very excellent, altogether invaluable. I am largely indebted to it. It is much superior to that of the attorney general of England, William de Grey, written about the same time for the same purpose.

asserting their rights. The battle of 1735 was of real strategic importance in the long campaign. After it the Commons moved their banners forward and camped one march nearer the citadel of the enemy. From that time the public accounts, which had before been audited by a joint committee of the two Houses, were audited by the Commons alone.

The determination of the Commons House to establish for themselves the privileges of the British House of Commons is emphasized by the trifling incidents that could occasion a conflict. In 1739 the mere omission of the word "honorable" before the name of Councillor Hammerton and its use before that of Mr. Pinckney, Speaker of the Commons, precipitated a general contest on rights and privileges. The conflict was fiercer than ever before. The great strategic position was money bills; the Commons claimed sole control, and the Council asserted their right to amend. The privileges of the British House of Commons was the slogan of the Lower House; the royal instructions that of the Upper. The sun of their official life set, and went down upon their wrath; the Assembly's triennial term expired with no tax bill passed, each House holding its pretentions high. The newly elected Assembly took up the battle without a lull, and flew into resolutions on the undoubted rights of Englishmen. Only the thunder clouds of real war gave surcease to the war of words; threatened hostilities with Spain forced the Assembly to provide a public revenue against the galleons that would not fail to creep from the shadows of the Morro to harry the coast of Carolina.

With an express reservation of their respective privileges, which were not to be considered as in any wise

committed, the two Houses agreed upon a temporary compromise. The Council was not to amend money bills, but might recommend in a message any necessary addition or change. If the Lower House approved, they threw out the original bill altogether, after a similar occasional practice in England, and brought in a new bill embodying the suggestions. The Commons saved the principle and stationed their outposts one furlong nearer the entrenchments of prerogative.[1] When the accomplishment of particular objects required, the Commons denied to the Council even the privilege of suggestion. For the sake of peace, the Council acquiesced, and the Commons, says Bull, "thus coming off victorious, soon felt their strength to consist in holding the purse strings of the people."

In 1756 the contest was again on, and the Commons gained most important victories on two points. The diplomatic corps of the province of South Carolina consisted of but one ambassador, and he at the honorable court of St. James. This was the regular "agent," who was kept in England to attend to the general interests of the colony. Before the days when "the undoubted rights of Englishmen" began to be doubted, and while the Council was still a passable legislative body, the agent was appointed by both Houses, and the business with him was conducted by a joint "committee of correspondence." In 1749 Charles Crokat was thus appointed. In 1756 he wrote that his private affairs forbade his longer attending to the colony's business, and begged to be relieved. Mr. Charles Pinckney, wealthy, able, upright, was then in England, and to him the eyes

1 Com. Jour. S. C., MS., IX., 711; Pub. Rec. S. C., MS., XXXII., 326.

of the Council turned. But Mr. Pinckney, sometime chief justice of South Carolina by gracious appointment of Majesty, was himself a member of the Council. The Commons preferred Mr. Crokat, and to enable him to continue his services, inserted in the tax bill an item of £1,400 currency for his salary. The Council asserted its old right of amendment, and refused to pass the tax bill with the item for Crokat. Time after time the bill was rejected; neither side would yield. The Commons published the whole affair, together with a long vindication of their rights, and an arraignment of the other House. Great popular resentment was excited against the opposers of the people's representatives. The Council, though responsible only to the King, yet feeling the stress of public opinion, issued a long rejoinder. Three causes conspired to the victory of the Commons: popular acclamation, the arrival of a new Governor, and the beginning of the Seven Years' War. To give the new Governor a smooth start, and as the royal part in the government was anxious to keep the Commons in good humor for the King's requisitions for the war, says Lieutenant-Governor Bull, the Council yielded and passed the tax bill as sent up by the Commons, thus surrending their right to strike out the £1,400.[1]

The estrangement between the two Houses now became almost complete. From about this time friendly conferences and joint committees totally ceased; Lieutenant-Governor Bull says in 1770 that he thinks that there has not been one in ten or fifteen years.[2]

The change regarding the agent and the committee of correspondence was also of great importance. The

1 Pub. Rec. S. C., MS., XXXII., 328.
2 Pub. Rec. S. C., MS., XXXII., 372.

Council would none of Mr. Crokat, and the Commons continued to correspond with him alone. The stubbornness of the Council lost them more than they realized. The monopoly of the committee of correspondence remained with the Commons. When in the years preceding the Revolution the colonies began their communications, which ended in the American Union, these communications were naturally referred to the standing committee of correspondence, which had by a kind of accident fallen into the hands of the Commons. At first a part of it (nine, e. g., on one occasion) was delegated to write such sporadic letters to sister colonies as were necessary. Afterwards the whole committee, as a ready prepared instrument, became one of the organs of revolution. The House directed it to communicate to all the other colonies every particular grievance against the Governor and Council, as well as South Carolina's sentiments on general American liberties, and it was ordered to continue to act after the House had adjourned.[1] This regular committee of correspondence continued this until superseded by the extralegal organizations of revolution of 1774-76.

In 1754 the designation of the two Houses changed. Until then the Commons called the Council the Upper House and themselves the Lower, or said Commons and Council indifferently. The Council and everybody else did the same thing. But after 1754 the use of these terms is rare and very dangerous to parliamentary peace. As above pointed out, the Council was becoming more distinctively an administrative board than a legislative house. This was largely due to the great increase of

1 Com. Jour. S. C., MS., XXXIX., pt. II., 27, 113.

wealth and population. It will be remembered also that the Council had come to be composed largely of Englishmen, royal officeholders subservient to the King. To be ruled by such a body was insufferable. The question was no longer one merely of parliamentary privileges between two houses of the legislature, but one of home rule versus being ruled by a clique of placemen, the creatures of a distant autocrat. In the very nature of the situation, the struggle hightened in intensity. The following important and altogether unique occurrence, involving equally Governor, Commons and Council, will make plain the state of affairs at the period of the Stamp Act:

In May, 1761, Thomas Boone, an Englishman, was commissioned Governor of South Carolina. In December he arrived.[1] Soon he refused to administer the "state oaths" to a member-elect of Assembly, because he questioned whether the gentleman had been duly elected. A high dispute raged; Boone dissolved the House. The Commons denounced Boone to the King for presuming to infringe on their sole right to judge of elections, and published a 78-page pamphlet, which they distributed in South Carolina and England.[2] The newly elected House denounced Boone's original act, and also his dissolution of their predecessors, and refused even to furnish resistance against the Indians, who were taking the war path, until he had given satisfaction. Boone prorogued them and, contrary to law, held no Assembly for eight months.[3]

1 Pub. Rec. S. C., MS., XXX., 308; XXIX., 210; Com. Jour. S. C., MS., XXXIV., 270, 271.

2 Com. Jour. S. C., MS., XXXVI., 29; Pub. Rec. S. C., MS., XXX., 154, 164, 167.

3 Ib.

By the advice of the ministry, the King reprimanded Boone very severely; but before the Commons he was hypocritically endorsed, and they were told that Governor Boone was right in maintaining the "royal prerogative," and that they had been guilty of a violation of duty to their sovereign with which he was highly displeased.[1]

After his singularly insolent words and conduct, Governor Boone was "surprised" to find that the appropriation bill contained no item for his salary. Immediately after his arrival in December, 1761, before he had trodden upon their privileges, the Assembly had paid him for the few remaining days of the year £86, 6s. currency, about $61, the exact proportion of the annual allowance of £3,500. Further than this, during the two and a half years that he remained in South Carolina, no shilling did he get.[2] No royal Governor of the province had ever before been denied his pay. In 1764 the Council sent in a message to the Commons threatening to throw out the tax bill unless the sum of £7,000 for Governor Boone's salary was added. This brought down the heaviest blow that the Council had ever received. Said the Commons, in substance:

We would be surprised at your effrontery if repeated offences had not accustomed us to it. As for your "instructions" from the King, you certainly need instructions from somebody; in this particular matter, however, we question the reliability of your statement. We do not need you to tell us that no Governor was ever deprived of his allowance since this became a royal colony; that only emphasizes his demerits; never before has any Gov-

1 Pub. Rec. S. C., MS., XXX., 172-5.
2 Com. Jour. S. C., MS., XXXV., pt. I., 161; Pub. Rec. S. C., MS., XXX., 296.

ernor been so enormous in his "repeated insults and attacks upon the rights and privileges of the people." The money "is *not* a salary, but a gratuity from the people, which they would be stupid to bestow upon a Governor who has endeavored to deprive them of what ought to be valued by every Englishman more than life itself." But that we may give even you your dues, we must "most highly applaud your most profound sagacity in discovering the" virtues of a Governor whose "haughtiness and despotism" South Carolina has never seen exceeded. We can easily understand your his sycophants' "utmost . . . suppleness . . . to avoid that suspended rod, which the least refractoriness would inevitably bring" down. We do not know how much you are being rewarded for this, you disinterested "volunteers"; but know "that we will not restore the sum of £7,000. . . . . NO! not even for your favorite GOVERNOR!"[1]

Such were the relations of the Commons and the Council at the period of the Stamp Act. The character of the Council had been radically changed. Our next chapter will see a still more startling advance in this revolution which was going on within the government of the province of South Carolina.

1 Com. Jour. S. C., MS., XXXVI., 342-6.

Withholding Governor Boone's salary was not a measure of economy to save the money involved. After Boone's departure, the Commons resolved that the withholding of the salary was perfectly right and "must always remain unimpeached; . . . but as our truly Patriotic Sovereign has been pleased to discountenance oppression by removing that arbitrary and imperious Governor for daring to trample on the people's liberties," we will, in deference to His Majesty's request, and not from any obligation, insert the little £7,000 in our next budget. And as for you, Governor Lord Montagu, we will say, that we cannot establish any regular salary, as His Majesty urges: but we have no doubt that at the proper time this House will allow you what has been customary for the gentleman filling the position you have come to occupy. Com. Jour. S. C., MS., XXXVII., pt. II., 165.

CHAPTER IX.

Appropriation of Money on the Sole Authority of the Commons.

Far reaching was the influence of John Wilkes of Middlesex. Not only did he sorely vex George III. in old England, but he played a large part in overthrowing the royal prerogative and the power of His Majesty's Council in South Carolina.

As before remarked, by the formal constitution of South Carolina, i. e. the royal instructions to Governors, there was but one way of issuing money from the treasury—by vote of the Commons and the Council and the concurrence of the Governor. But a fateful variation from the strict letter of the law was sometimes allowed. Mark the small steps of a progress which when completed worked a revolution. To pass an appropriation bill through three readings in each of two Houses, have it signed by the Governor, and formally ratified by both Commons and Council was a process requiring more or less time. Therefore in great emergencies the following quick method was sometimes practiced: a simple resolution, requiring but one voting, was passed by Commons and Council and was concurred in by the Governor, the Commons at the same time resolving to replace the money by the next tax bill. It was a kind of borrowing from the treasury in an informal way and repaying in the prescribed constitutional form. We have already observed how the control of the budget had been gained by the Commons.

How easy, therefore, was the next step of making appropriations still more expeditiously by the Commons alone resolving that the treasurer should pay certain sums on the requisition of the Governor, and resolving also, as before, to make provision in the budget. So far there was nothing to alarm or offend the royal constituents in the government. But how easy was one more step, for the Commons to order the treasurer to advance certain sums to a committee of themselves, resolving, as always, to make good the amount. If the money was for the King's service and time was very pressing, His Majesty's Council and the royal Governor would hardly make serious objection on the score of mere technical irregularity. Of late years, says Lieutenant-Governor Bull in 1770, even this method had been allowed to go unchallenged, because of the reasonableness of the service or the reluctance to raise one of those struggles on "the undoubted rights of Englishmen." When the Council had made any objection, they had always come out the worse for it.

So in 1770 there were three methods of drawing money from the treasury: first, by the concurrence of the Commons, Council and Governor; second, by the Commons ordering the money to be paid on the requisition of the Governor; and third, by the Commons ordering the money to be paid to anybody they should designate.[1] But when the appropriations of the Commons reached the £10,500 point currency and had John Wilkes mixed up in it, it was time to call a halt. Majesty himself personally commanded that a halt must be called. The runaway team of a Commons

1 Pub. Rec. S. C., MS., XXXII., 132.

House having gotten well beyond control, it would evidently require an immense amount of pulling and coaxing and tugging and jerking to bring them back to an orderly constitutional jog trot, if indeed they did not utterly tear to pieces the antiquated vehicle.

How John Wilkes, of Middlesex, was elected to the British Parliament, how he was expelled, and how he became the black beast of George III. and the glorified champion of the party of liberty, is known to the world. "Bill of Rights Societies" were organized all over England, and indeed the British empire. Their proceedings, and everything else concerning John Wilkes, fill the South Carolina newspapers in those years. The attachment to the cause of liberty as represented by Wilkes was intense in South Carolina. Societies in the interest of him and violated British liberty were organized in the province, and enthusiasm went to a hight. Take, e. g., the following advertisement, which appeared in the *South Carolina Gazette* of December 2, 1772:

Charles Town, Nov. 21, 1772.

THE FRIENDS OF LIBERTY

Agreeable to the English Constitution,

Who are members, and particularly the Stewards,

OF CLUB No. 45,

The meeting of which was adjourned to the Day whereon certain advice should be received of the intrepid patriot

JOHN WILKES, Esq.,

Being advanced to the high dignity of

LORD MAYOR of London,

are desired to meet at Mr. Holliday's Tavern at Six

o'clock THIS EVENING, to choose Stewards, and otherwise prepare for the Celebration of their sincere joy upon so glorious and important an event.

"The Supporters of the Bill of Rights" in England sent requests for aid to all parts of America. On December 8, 1769, the Commons House of Assembly of South Carolina responded by sending to England £1,500 sterling of the public money for this cause.[1] In their Journal it reads, that the public treasurers should pay to a committee of members the sum of £10,500 currency, to be sent to England, "for the defense of British and American Liberty."[2] From the Public Records we learn that the money actually arrived in England.

Here then was an offense that smelt rank in the nostrils of Majesty. The representatives of the people of South Carolina, in the Commons House of Assembly, had defied the concurrent authority of the Governor and Council, completely ignored them, and had sent £1,500 good sterling money to England to support the cause of the arch enemy of George III. The King was outraged. He gave the matter his personal attention. The attorney general of England, William de Grey, was ordered to investigate the constitutional history of South Carolina from 1662 and report whether any shadow of pretext existed, ever had existed, or by any possibility could be construed to exist, for the action of the Commons. Lieutenant-Governor Bull across the water was given the same task. The ventilation of this affair between London and Charleston for the next five years fills hundreds of pages in the Public Records

1 *S. C. and Amer. Gen. Gaz.*, Dec. 4-13, 1769.
2 Com. Jour. S. C., MS., XXXVIII., 215.

to the overshadowing of all other subjects, until the Revolution was fairly upon the empire.

On February 13, 1770, de Grey handed in his report. It is an admirable constitutional sketch, clear and concise, and, if its premises are admitted, thoroughly conclusive. He assumes the royal instructions to Governors, which define the branches of government and the functions, privileges and limitations of each, to be the constitution of South Carolina. He cites these instructions by sections, just as now our supreme courts cite the sections of the written Constitution, and decides that, "by the Constitution of that Colony," no warrant exists for the Commons House of Assembly to appropriate money or do any other legislative act by their sole authority. The Council had co-ordinate powers, he says, in amending and passing money bills.[1] The significance of this theory of colonial constitutional law will be considered later.[2]

Lieutenant-Governor Bull's paper is an abler document than de Grey's. It is much more historical in method. In tracing the actual relations of the Commons and the Council, exhibiting the ever growing power of the former, it is doubtless the most valuable single document in the Public Records on the constitutional development of the province. Bull's own life as a public man covered much of what he described, and he could therefore explain the movement of many causes and motives that do not appear in the official Journals. He took the same ground as de Grey, but recognized that as a practical question, to set this wrenching of the

1 Pub. Rec. S. C., MS., XXXII., 166-181.

2 Some consideration of this is found in Chapter XI. below; the full discussion, however, by the very nature of the case is found in the portion of the thesis not published at this time.

instructions constitution right would require the most prudent firmness and the most masterful tact; that it was a task of the utmost difficulty, if indeed it were possible at all.

On the strength of his various advices the King ordered sent to the Governor or Lieutenant Governor of South Carolina his supremest mandate, known as the "Additional Instruction of April 14, 1770."[1] By it, the claims of the Assembly were forbidden in the most emphatic terms, and the absolute coordinate power of the Council in amending and passing money bills was reaffirmed with the greatest positiveness possible to employ. The King emphasizes his emphasis and italicizes his italics. The Governor, or Lieutenant-Governor, and Council were forbidden under pain of the highest displeasure and instant removal to allow any bill to pass which appropriated a single farthing except for specified services of the King's government in South Carolina or for his direct specified service elsewhere.—"For the defence of British and American liberty!" A pretty governmental service!—By forbidding the reimbursing of the treasurers, the King hoped not only to win the constitutional point at issue, but to be able to sue the officers, as the law provided, for thrice the amount, and so accomplish their punishment and ruin as an example for the future.

So here is the battle fairly and specifically joined between the King's most personal Majesty armed with the prerogative, and the Commons House of Assembly armed with the determination to maintain the undoubted rights of Englishmen, which are getting to be considerably doubted, among others to dispose of their money

1 Pub. Rec. S. C., MS., XXXII., 236, 249.

as they pleased, and particularly to replace the £10,500 currency as they had promised.

The Council did not require the additional instruction to oppose the growing pretentions of the Commons. Their own dignity, their very existence, was at stake. Lieutenant-Governor Bull instructed them that they should reject the tax bill if the item of £10,500 to reimburse the treasurers appeared.—Instructed what to pass and what to reject, and yet claiming to be a coordinate House of the legislature.[1]—On April 5, 1770, before the arrival of the additional instruction, or reiterative amendment of the constitution as we might call it, the Council sent in to the Commons a message on the tax bill, making certain suggestions but not attempting to propose any formal amendment. The message was in substance as follows:

We are surprised that you make provision for reimbursing the public treasurers for the £10,500 sent to England. All moneys are granted expressly for the King's service; but this £10,500 "tacitly affronts His Majesty's government." We do not desire any contest as to the constitutional rights of the two Houses in dealing with money bills, nor to raise the question of our right to amend; we simply wish to intimate that if the tax bill stands as it is, it will likely fail to obtain our concurrence, which is certainly necessary. Do not be so stubborn to have your own way and thus stop government and destroy public credit. We do not enter upon the question of your power to appropriate the £10,500 in the first instance by your sole resolution. But we cannot let the affair pass without at least this notice, lest it

1 Pub. Rec. S. C., MS., XXXII., 298.

should, as would be inevitable, finally come about that our legislative power should be interpreted away and construed into mere advice to the Governor, "according to the ingenious distinction of a Governor many years ago."[1]

The Commons ordered this message expugned from their Journal as an injurious and indecent insult.—Gentlemen of the Council, we do not wish a conflict; to avoid any altercation, we return to you your paper for your calm consideration.[2]—But instead of calmly considering their message, the Council sent it back again. Then waxed the anger of the Commons. Business was dropped; they refused to hold any further communication, even of the most formal character, with the Council, and entered upon the consideration of the conduct of that body. Lieutenant-Governor Bull, believing that it is idle hands that Satan finds mischief for, urged the Commons to consider the flour and tobacco bills:—Very interesting, gentlemen; very important; commercial prosperity. But immediately, he says, there arose a storm of "No! No!" On April 9, the House appointed a committee of ten of the leading men of South Carolina to report what steps were necessary. The next morning they reported, in substance, thus, answering the arguments of the Council and arraigning them for at-

1 Com. Jour. S. C., MS., XXXVIII., 387.

It seems that this "ingenious distinction" was made in about 1745 or 1750. On one occasion (I gather about the date just named) several members of the Commons went to the Governor and informed him that there were a sufficient number in their House willing to pass the tax bill, and asked whether he would sign it if brought to him without having been submitted to the Council. The Governor however declined to consent to such a proceeding; what "ingenious distinctions" he then uttered as private opinions I do not know. Since this whole proceeding was extralegal there is hardly any likelihood that any trace of it can be found in any of the contemporary Journals, though the Public Records, from which I have gathered these details, which are given by Bull in his official correspondence in 1770, may contain further information.

2 Com. Jour. S. C., MS., XXXVIII., 384.

tempting to deny the rights of the people's representatives:

The Council's seeking to usurp the just rights of the Commons is responsible for whatever injury has come to the government and the public credit. Further, we report:

1st. Their message is without truth or justice, and is a mean attempt to bring the Commons House into contempt before their sovereign and the people.

. . . . . .

4th. It is altogether contrary to truth and to the undeniable privileges of this House to assert or insinuate that it has not power to appropriate money for such purposes as that for which we appropriated the £10,500.

5th. The contention of the Council to control money bills is a "seditious doctrine . . . for the interposition of some power to raise money upon the inhabitants of this province other than their own representatives."

6th. This House has always "exercised a right of borrowing moneys out of the treasury, . . . which right no Governor has ever attempted to control."

7th. The defense of the constitutional liberty of the people of Great Britain and America is a proper, and not a disloyal purpose.

8th. A former Governor's opinion concerning the advisory character of the Council's votes only confirms our contention that you are no Upper House, as with duplicity you claim to be. We hope that we can induce His Majesty to appoint a real Upper House, distinct from the Council, which shall be composed of men of independence and property.

9th. We will prepare an address to His Majesty to grant this return to our original constitution.

10th. We will address the Lieutenant-Governor to provide some immediate remedy for the Council's "insult and indignity offered to this House," and to prevent their mischievously stopping the public business.[1]

These resolutions were as obnoxious to Lieutenant-Governor Bull as to the Council. Yet his prudence and conciliatory mien, unlike the high conduct of the English Governors, had not allowed him to come to a clash with the Assembly. But he was on the alert. He knew well, he wrote to the Ministry, the danger of allowing "popular assemblies . . . to be hurried by their heated imaginations into wanton and extravagant resolutions, from which they rarely can be brought afterwards to recede." But to the Commons he said, in substance: Gentlemen, your private affairs at this season of the year doubtless require your attention. You have earned my thanks by your close attention to the public business. Therefore, on this 11th of April, 1770, being planting time, I do prorogue this General Assembly.—And "may God save the King!" This prorogation prevented the Commons from coming to a vote on their resolutions; but greatly to Bull's chagrin, almost all the members, though deprived of official character, joined in publishing them in the newspapers, along with much other matter of the same kind.[2] When the resolutions were at last voted on months afterwards, those desiring the King to take away the legislative power of the Council were omitted.[3]

1 Com. Jour. S. C., MS., XXXVIII., 389.
2 Com. Jour. S. C., MS., XXXVIII., 393; Pub. Rec. S. C., MS., XXXII., 256.
3 Pub. Rec. S. C., MS., XXXII., 316.

As we remember, a few instances of the Commons alone ordering money out of the treasury in times of crisis had been allowed to pass "*sub silentio*," because of the notorious reasonableness of the service. Now the Commons claimed these instances as proving their undoubted constitutional right, as established by the usages of the past, which the usurping Council were trying to wrest from the representatives of the people. They had their London agent, Charles Garth, to present their claims to the King and prove that they had not been appropriating money by their sole authority, but only borrowing it.[1] But Majesty's ears were sealed like a granite mountain side against pleadings for a practice in which lurked John Wilkes and a whole host of abominations.

So this is the plan: Commons to "borrow" money from the treasury for such purposes as the Governor and Council would never approve, and insert enough in the next tax bill, to be passed by Commons, Governor and Council, to replace the borrowed funds, apprehending that the Governor would not veto the whole budget and stop the government just for that one item. We see too how necessary it was to deny the Council's power of amendment and force them to pass or reject the whole as it stood.

A new Assembly met, but there was no break in the deadlock. The Commons declared that unless the additional instruction of April 14 was revoked, they would raise no money, even for years to come. The Governor and the Council had from the first set themselves, considering whether it were not well to die in this last ditch of their old time prerogative. By the addi-

1 Pub. Rec. S. C., MS., XXXII., 422; XXXIII., 142.

tional instruction they were trebly fortified, and when Majesty's own pats on the back began to come with every mail from London, they were elevated into a sort of ecstatic stiff-neckedness unto eternal unyieldingness. My Lord, writes Bull in substance, we will never yield now. I have informed the Council of the King's approbation of their conduct, "and they have desired me to inform your Lordship in the most expressive terms that the King's approbation of their conduct fills them with the deepest sentiments of gratitude and animates them with firmness to support every measure that can demonstrate their zealous attachment to His Majesty's person and government."[1]

No tax bill was passed and funds to carry on the government began to be lacking. Only the general duty law continued. In 1771 writes Governor Lord Montagu, who arrived in September, "The King's officers suffer for their salaries."[2] The Commons would make no concession of their claim to issue their own money as they pleased. In October, 1771, they repeated their defiance by ordering the public treasurers to advance £3,000 currency, to be reimbursed to them, for purchasing raw silk for export for the encouragement of the production of that staple in the province. The treasurers, between the devil of a King and the deep blue sea of an Assembly, knew not what to do. Prudence forced them humbly to refuse, as their bonds would be sued and they themselves utterly ruined. Whereupon, for this violation and contempt of their authority and privileges, the House ordered the treasurers into the "common gaol in Charles Town." Such an offence by the

1 Pub. Rec. S. C., MS., XXXIII., 39.
2 Pub. Rec. S. C., MS., XXXIII., 87.

Commons against the express letter of the King's instruction merited nothing less than the parliamentary death penalty; a dissolution instantly put a period to their existence.[1]

How striking is the parallel to English history, where the British Commons are calling to account some royal servant who has acted with contempt towards their House or has been guilty of some more serious act of enmity against the people, and who is rescued from the Commons by a royal prorogation or dissolution.

For some time the Earl of Hillsborough, Principal Secretary of State for America, was unstinting in his endorsement of the Governor's position. We must bring these unreasonable Commons to terms, he says.[2] But he little knew the nature of his task. By the spring of 1772 he is looking around for some loophole by which the King can escape and yet win the victory over the Commons. While such hints and compromises were being held out, the new Assembly met, in the early part of April, and showed their own uncompromising spirit by beginning their career with an absolute refusal to proceed to any business so long as the additional instruction remained unrevoked. Dissolution was instant.[3] Many of the members then met in a kind of caucus and resolved, first, that they would pass no tax bill without the £10,500 being included in it; second, nor any tax bill containing any allusion to the King's offer to compromise by allowing a special separate bill for the contested sum; third, that they would on no account pass any act declaring the Council to have an

1 Com. Jour. S. C., MS., XXXVII., 543, 582-4; Pub. Rec. S. C., MS., XXXIII., 89.

2 Pub. Rec. S. C., MS., XXXIII., 105-7.

3 Pub. Rec. S. C., MS., XXXIII., 140.

equal voice in the passing of money bills.[1] You may believe this like inspiration, My Lord, says Governor Lord Montagu.

To have the advances of a King, made through an Earl, thus flouted was not pleasing to a Principal Secretary of State. Lord Hillsborough began to grow impatient with Lord Montagu, like Spanish monarchs with explorers who kept returning without the gold, which monarchs knew could be got if the stupid explorers would only go at it right. He sends such messages as wound the heart of the faithful Governor. On July 1, 1772, he writes, in substance, thus: You must not be so violent; you must carry the King's point, yet conciliate the Commons; you must be unbendingly firm, but perfectly unantagonistic; you must carry water on both shoulders at once, sir! Now, when that new Assembly meet, you must let them have their say, and only after calm and temperate treatment fails to bring them to reason are you to dissolve them. We can't revoke that additional instruction of April 14, 1770; but if the Assembly would of its own accord pass a declaration to the effect that the Council has equal rights in amending money bills, and that no funds can be issued without their concurrence, why then, you see, the additional instruction would just fall into desuetude of itself. This trouble will soon be over; for I am sure that the substantial, thinking men don't uphold the usurpations of the Commons.[2]

In nothing could Lord Hillsborough have been more in error than in his closing opinion. It was the men of education and wealth in the province who were the

1 Pub. Rec. S. C., MS., XXXIII., 175.
2 Pub. Rec. S. C., MS., XXXIII., 161-4.

quickest and most unyielding in defence of their own and America's rights. To the Speaker of the Commons himself, Hon. Rawlins Lowndes, is recorded a single grant of thirty thousand acres. Untitled barons these great planters were, who counted their servants and cattle after the arithmetic of Job.

In the summer of 1772 Lord Montagu hit upon a strategy for conquering the Commons miraculous in its clumsiness. As he knew they would never omit the £10,500 while in Charleston, he says, he would convene them in the remote village of Beaufort, where members could ill afford to go at all and where they might be shaken, as it were, into compliance by a series of short, jerky prorogations.[1] In Beaufort, therefore, he summoned them, expecting a sparse, weak attendance. In this small town, some fifty miles in a direct line down the coast, the Assembly met, on October 8, 1772. There was the fullest attendance for the first day of an Assembly ever recorded in the history of the province. The Governor now had two fights on his hands ; the old matter of the £10,500 and its attendant constitutional questions, and the new one of calling the Assembly in an unusual place, a thing which had never been done except for causes of public necessity. On the 10th Lord Montagu made the Commons a well worded speech and prorogued them for twelve days, to meet at their accustomed place in Charleston. His plan had been worse than a failure ; it had given a new vantage ground and additional strength to the enemy.

On the 22d of October the Assembly reconvened, according to prorogation, in the capital. On the 23d they

1 Pub. Rec. S. C., MS., XXXIII., 167, 174.

appointed a committee to draft a message to the Governor. Usually the few prompt members had to wait several days, perhaps more than a week, for a sufficient number to make a house and proceed to business. But not so now. Lord Montagu was demanded his reasons for calling the Assembly away from the capital, in the remote village of Beaufort. For the public benefit, answered the Governor. Your explanations do not explain, replied the House, and proceeded to draft very strong resolutions denouncing the conduct of Lord Montagu. The report of their committee is very vigorous. They say in substance:

The Governor's conduct calls for the utmost resentment. It was intended to intimidate or weary the people into compliance with his oppression; but let him know that nothing could cause them to deviate "in the minutest degree from the rights and privileges of the people." Sir, such conduct shall not become a precedent. The troubles of this province are not due to the people's representatives, but to you, who veto their good laws and violate their privileges. And as for that matter of the £10,500 which started all this, we would state that it is an undoubted constitutional principle that the Commons have the control in framing money bills. And as for your Excellency's reflection regarding the duty of "a wise senator to annihilate an unconstitutional claim," we would remark that the same observation might apply with equal propriety to a truly patriotic Governor.

During this session Lord Montagu sent for the Journals every day, so as to prevent any high schemes the Commons might have in view. On October 29, when his messenger went as usual to the clerk of the House,

that functionary replied that the speaker had himself taken charge of the Journals. This made the Governor very angry; he did not succeed in getting the wished for records until ten minutes before the convening of the House the next morning. They were so blotted and interlined as to be almost totally illegible.[1] Then the Governor was still more angry. But his ire was to know a yet hotter flame. When he did succeed in deciphering the blotted, scrawling pages sufficiently to gain the drift of things, he loaded his gubernatorial cannon with an immense bombshell of a prorogation and summoned the Assembly into immediate attendance, to be blown into the middle of week-after-next. He dared not discharge at them a dissolution; for the ministerial hand had only recently smitten him for so angering the Commons.

But for Lord Montagu there were still greater surprises and still greater anger, rising even to the "unprecedented" point. When the summons arrived, whose significance the members well knew, the House was just coming to a vote on the resolutions. They were not to be thus wheedled out of denouncing the violator of their rights. As in a somewhat similar case during the resistance to Charles I., they ordered the Speaker not to quit the chair until their business was finished. But no Holles and Valentine were needed now to seize a reluctant presiding officer and force him back into his

1 The Commons deny that their Journal was put in this condition for the purpose of concealing anything. It was, they said, the rough, untranscribed draft. Quite true, doubtless; but note that on former days the Governor had met no such difficulties. (Pub. Rec. S. C., MS., XXXIII., 208.) Speaker Lowndes appeared in a newspaper article in the *South Carolina Gazette* for November 12, in reply to the aspersion of Lord Montagu, and maintained that he had as good a right as the Governor to inspect the Journals over night. To my mind there is hardly a doubt that there was a desire to keep the Governor in ignorance in order to prevent an adjournment.

place.[1] The House refused to come until it had passed its resolutions. This was an unprecedented action of the most serious character. If the Commons began to disregard the summons of the Governor and continued to transact business, it was a short road to destroying the royal prerogative of prorogation and dissolution. Having passed their resolves, the House attended the Governor in the Council chamber, where they were angrily reprimanded and then prorogued.

Governor Montagu recognized the gravity of the crisis in which the royal government in South Carolina stood. On November 4, 1772, he wrote to the ministry that the state of affairs was most alarming and unless arrested would shake the very power of the King. The Commons, he said, had made three innovations that would bring about a revolution in the "very nature of the constitution." First, for three years they had maintained their right to dispose of the public money on their sole authority; second, they had proceeded with business after being summoned instantly to attend the Governor; third, their committee of correspondence had continued to act after a prorogation.[2] On this last, Lord Montagu put special emphasis, as it put it utterly beyond his power to stop schemes of agitation or combination that were hostile to himself or to the King's interests.

1 In 1628-9 the British House of Commons summoned a tax collector for contempt; the King prorogued them for the protection of his servant. On their reassembling he again ordered them to adjourn. Eliot rose to propose resolutions; the Speaker left the chair, saying that the King had ordered him to do so if anyone attempted to speak. Holles and Valentine seized him and forced him down into the chair, the former exclaiming, "God's wounds, you shall sit here till we please to rise!" The resolutions were passed and the House adjourned. In an angry, threatening speech the King dissolved them. (Taswell-Langmead, 576.) The similarity in the South Carolina case was, of course, no slavish imitation of the above instance, but a similar result from similar causes in a House which professed the British House of Commons to be its model.

2 Pub. Rec. S. C., MS., XXXIII., 191.

Further details of the contest are needless. On September 13, 1773, the Commons again manifested their defiance of the additional instruction and their determination to control their own money affairs by ordering the treasurers to issue £1,500 currency to the Commissary general for poor Irish immigrants. A few days later they ordered three thousand pounds.[1]

Just at this time occurred the grand climacteric in the revolution which had been going on for fifty years in the relations of the Commons and the Council. The occasion was so interesting and the outcome so important that we must open another chapter.

1 Com. Jour. S. C., MS., XXXIX., pt. II., 76, 98; Pub. Rec. S. C., MS., XXXIII., 305.

CHAPTER X.

Attempt of the Commons to Abolish the Legislative Character of the Council.

In the many contests to wrest power from the Council, the Commons had always denied their authority in framing money bills, but had admitted the necessity of their concurrence for the passage of those and of all other regular acts of legislation. Demurrer was often made by members as a matter of private opinion; but no official declaration against the necessity of the Council's assent occurred until very late in the provincial history.

When in their message of April, 1770, the Council said that they could not allow the action of the Commons regarding the £10,500 to pass unnoticed, lest their own legislative power should be construed into mere advice to the Governor, they showed their apprehension of such a claim.

As early as about 1745 or 1750, in a dispute between the two bodies, certain Commoners waited upon the Governor to ascertain whether or not he would accept and sign the tax bill if sent to him from the Commons without having been passed by the Council. But this was too radical and sudden. The Governor replied that he could not. From then on the theory of the Commons, asserted from time to time with more or less explicitness, but never brought to the test, was that the vote of the Council was mere advice to the Governor to pass or reject a law, which he might follow or ignore as he

pleased.[1] He could certainly refuse to accept the "advice" of an affirmative vote, and veto the bill; but whether he could ignore the "advice" of a negative vote and pass an act against the will of what the King declared to be a coordinate lawmaking body with the Commons, was quite another question. As the third quarter of the 18th century advanced, the opinion became more and more general that the Council was not properly an independent branch of the legislature. Though the Commons never attempted to pass laws simply by their own authority and the concurrence of the Governor, they yet about 1754 dropped the appellation of "Upper House" and "Lower House," and refused to carry on any communications in which those terms were used. In the year 1763, e. g., a message was sent to them signed "Speaker of the Council." The Commons refused further intercourse with the Council until the offensive words were replaced by the accustomed "President"; for the term "Speaker," they said, implied that the Council was a House of the legislature.[2] In their resolutions of April, 1770, the Commons formally declared that the Council was no upper house ; but, they said, an upper house was needed ; they expressed a desire that there might be such a true upper house, and announced their intention of petitioning that one should be appointed by the King.

The great £10,500 contest brought the whole constitution of the province of South Carolina into examination. Never before had the royal elements scrutinized so closely the letter of the law to justify their privileges ; never before had the Commons gone so far in the asser-

1 Pub. Rec. S. C., MS., XXXIII., 306.
2 Com. Jour. S. C., MS., XXXVI., 30.

tion of their powers. Each instance of derogation by the Commons from the authority of the Council was to gain some specific end. It was to be expected that the most protracted and serious contest that ever occurred between the two bodies would leave some new and important change in their permanent relations. Such was the case. In 1773 a judicial decision and the action of Commons united to deny the legislative character of the Council with a deliberation and emphasis which make this one of the most important incidents in the long struggle. This was not precipitated directly by the money bill, though the highly charged state of public feeling due to the still pending £10,500 was the efficient cause.

In 1773 the Council was composed of eight members, not including two who had long been absent in England and the Lieutenant-Governor, who after March 10 administered the government. Three of these were independent South Carolinians; five were royal officeholders, mostly if not altogether Englishmen. This latter group was composed of the chief justice and an assistant judge, both Englishmen, the secretary of the province, the receiver general of His Majesty's quit rents, and the superintendent of Indian affairs.[1] John Drayton, his son William Henry Drayton, and Bernard Elliott, all independent South Carolinians, maintained in the Council the same doctrines their fellow citizens preached in the Commons.

Part of the proceeding of the Council on August 26, 1773, was a protest by two of the minority against the business blocking conduct of that body. This paper

1 Pub. Rec. of S. C., MS., XXXIII., 256; XXXIV., 228; XXXVI., 279.

they gave to Mr. Thomas Powell to publish in his journal, the *South Carolina Gazette*, which on August 30 he accordingly did. The Council considered Printer Powell's act a violation and contempt of their privileges and committed him to the common jail in Charleston, on a warrant signed by their President, Sir Egerton Leigh.

When the Habeas Corpus Act was made of force in South Carolina by the Assembly in 1712, it was provided that any two justices of the peace (one being of the quorum) should have authority to grant the writ. On September 3, 1773, Messrs. Rawlins Lowndes and G. G. Powell, formerly assistant judges but now only magistrates, in accordance with this law granted the confined printer his liberty. Now, it happened that Rawlins Lowndes was Speaker and Col. G. G. Powell a member of the Commons House of Assembly, which was at that time in session. For their "most atrocious contempt" upon the Council, that body requested the Commons to withdraw from these two gentlemen the protection of their privileges of membership, that they too, doubtless, might be committed to the common jail. This the House refused to do, though both members desired it. On the contrary, the Commons ordered all the papers in the case to be laid before them and proceeded to summon and examine persons. Thus Mr. Lowndes's and Mr. G. G. Powell's decisions are preserved *verbatim*, and most important and interesting decisions they are; for that of Mr. Lowndes is the most complete and deliberate statement of the constitutional theory of the Commons regarding the legislature of the province that exists. Moreover, it forces the issue to its logical conclusion, as had never been done

before. The substance of Mr. Lowndes's opinion is as follows:

I hope that my connection with the Commons House of Assembly does not prevent my according to every other part of the community their just rights. The laws provide for the safety of every man's person, liberty and estate. By the Great Charter no man shall be imprisoned but by the judgment of his peers or the law of the land. This and all similar statutes for the security of the subject were made of force in this province by act of Assembly in 1712.

Both Houses of Parliament have from time immemorial exercised the right of imprisoning during their sittings persons guilty of contempt, and it is the uniform practice of the courts never to interfere, but if appealed to, always to remand the prisoner to confinement, as the Houses of Parliament are the supreme judges of their privileges. Let us therefore enquire what resemblance exists between the Council in South Carolina and the House of Lords in England, that the former should arrogate to themselves the privileges of the latter.

"The Lords are a permanent body, inheriting their right of legislation independently of the crown." They are the supreme court of judicature of the realm,[1] and try their own members on life and death without being upon oath. The Council, on the other hand, are mere appointees of the King, removable at his pleasure. Therefore they lack the greatest essentials of a legislative body to approximate them to the Lords, permanency and independence. Whereas the British Peers are

1 We remember that the Governor and Council were by the royal instructions the supreme court of appeal in South Carolina, but that this jurisdiction was never exercised.

numerous and are the bulwarks for the people against tyranny, the Council are few, only three at a meeting often determining matters of the greatest import; and besides, "the object of their care is more particularly the *Prerogative*." True, the Governor is restrained from passing any law to which the Council has not assented. From this single circumstance of the Governor's being subjected to their advice they have arrogated to themselves the position of an upper house of the legislature. "As if a right to advise the Governor to pass or reject a bill involved in it of necessary consequence all other privileges belonging to the Upper House of Parliament. . . . . .

"I am of opinion that there is no foundation in law for the commitment" of Printer Powell. It is a "usurpation of power in the Council. . . . The commitment is therefore in my opinion to be considered merely as a commitment by the Privy Council, and in that case has no other authority than if done by a private magistrate. The subject has his remedy by *habeas corpus* in either case, and we are now to consider whether the matter charged is an offense at law, and if an offense whether bailable or not.

"I am of opinion that it is no offense at law. . . .

"I am therefore for ordering the prisoner discharged."

Col. G. G. Powell's much shorter judgment to the same effect was then read. The House unanimously endorsed the opinions of the two justices, and addressed the Lieutenant-Governor to suspend all the Councillors who had been concerned in this usurpation of power and

unparalleled insult to the Commons. Of course the request was refused.[1]

Printer Powell brought suit against Sir Egerton Leigh, who signed the warrant, for assault and false imprisonment.[2] The court, presided over by King-appointed judges, two of whom as Councillors had helped order the arrest, naturally declared that the Council was an upper house of the legislature, and discharged the suit.

In the spring of 1775, William Henry Drayton was suspended from the Council on the address of the placemen there, because he had published aspersions upon the King's officers and government in his "Letter from Freeman," August 30, 1774, and had denied that the Council was an upper house of Assembly. In his defense he seeks to put his persecutors in a dilemma. Judges Gordon and Gregory, he says, themselves Councillors, dismissed the suit of Printer Powell against Sir Egerton Leigh, on the ground that the latter could not be questioned outside the Council for any acts or words in its proceedings, because that body was a house of the legislature analogous to the House of Lords. Now these judges, as members of the Council, contradict their own decision by indicting me before an outside jurisdiction, the Lieutenant Governor.[3]

Drayton's argument proves that the Council was no fit legislative body, but it does not prove that it was no legislative body. The general principle that its members were not to be questioned by any outside jurisdiction did not exclude the right of the Council itself to arraign a member before some authority constituted for

1 Com. Jour. S. C., MS., XXXIX., pt. II., 76-88, 96; *S. C. Gaz.*, Sept. 2, 6, 13, 1773.

2 This seems to have been a civil suit for damages.

3 Com. Jour. S. C., MS., XXXIX., pt. II., 254-69.

the purpose by the same law that created the Council itself. This was really not trying a member before an outside jurisdiction, but was simply requesting that outside power to execute upon him the sentence the body itself had come to after conducting the trial, or discussion, by itself. True, the Governor could suspend a Councillor independently without this process, but only under extraordinary circumstances; this phase of the law was not under discussion.

In their commitment of the treasurers in 1771 for refusing to advance £3,000 on the sole order of the Commons, that body was wholly outside the formal constitution. Their contentions were just, but not legal. The disorder to which final disruption from England was due was that law and justice had ceased to be the same. In all their efforts to destroy the power of the Council, it was an independent, very constitutional people struggling against an unnatural external authority and seeking to find constitutional justification for their acts. The root of all the trouble lay in the fact that the Council was the organ of a foreign autocrat, who sought by means of them and his equally obedient Governor or Lieutenant-Governor to reduce the province to a kind of royal apanage. The two extremes of republicanism and absolutism met in a contest not susceptible of compromise.

When the Earl of Dartmouth, who had succeeded Hillsborough in the superintendence of American affairs, heard of the action of the Commons in the Printer Powell case, he despaired of ever reestablishing the power of the Council.[1] Lieutenant-Governor Bull,

1 Pub. Rec. S. C., MS., XXXIV., 2.

wisest of all the King's servants in South Carolina, had long been without hope, since the Commons refused to defer to the King's express command in the additional instruction.

It is useless to detail the many parliamentary strategies by which the Commons sought to pass the tax bill with the £10,500 inserted ; but the Council had been roused to the highest resentful vigilance and could not be entrapped. Peril from the Indians, who were again on the war path, from bankruptcy, from imminence of the suspension of government, could move neither party to concession in the struggle that had already lasted for four years. The Council became such objects of opprobrium that scarcely a respectable citizen could be found to fill vacancies.

On March 22, 1774, the Council again rejected the tax bill, because of the item of £10,500 to reimburse the treasurers for the sum they had given the committee of the Commons to send to England in 1769 for the defence of British and American liberty. The Commons did not go to the logical extent of their theory that the Council was no branch of the legislature and send the bill to the Lieutenant-Governor for his approval. To have done so would have been a farce. But they invented a new way to ignore the lawmaking power of the Council and enforce their own sole will. The clerk of the House was ordered to issue to the public creditors certificates of indebtedness signed by himself and five members. These were taken in payment of debts and passed as money among the people, Lieutenant-Governor Bull of all men in South Carolina alone refusing to accept them. He had received not one farthing of salary since 1769, preferring to suffer

deprivation rather than countenace the assumptions of the Assembly by treating their paper as having lawful value.[1]

On the 23d of March, 1774, the Commons did by their sole authority an act that was more purely legislative and more assertive of their supreme control of all money matters than any former instance. There was a law at that time that the owner of an executed slave should be paid £200 currency for the loss of his property. On the above-mentioned day the Commons resolved that the value of the negro should be appraised by the magistrates and freeholders conducting the trial, and that the sum they named should be paid the owner. The attention of public officers was directed to this resolution, and they were ordered to conform to its requirements. Inspection of the public accounts shows that the resolution of the Commons was observed as law, and that two or three times the amount of money was taken from the treasury under the new rule as under the old.[2] Another act, at least semi-legislative in character, consummated by the Commons alone, was that on August 2, 1774, they called for a loan of £1,500 sterling for the expenses of their delegates to the Continental Congress and promised to repay the amount with interest.[3]

These acts have a deep significance. The question What is the state in any government? can be answered by ascertaining what power can dispose of the public money and have its mandates carried into effect. The theory that the King of England, or even the whole

1 Pub. Rec. S. C., MS., XXXIV., 24, 36.
2 Com. Jour. S. C., MS., XXXIX., pt. II., 159, 211.
3 Com. Jour. S. C., MS., XXXIX., pt. II., 172; Pub. Rec. S. C., MS., XXXIV., 188.

Parliament, was the state in the colonies was being rapidly proved to be fallacious; the state had shifted to America. The only logical consequence was a radical political reorganization which would give a true expression to the changed actuality. This reorganization took place in 1776. In the light of these considerations, we see plainly the essential relationship between the events we have been tracing in the provincial history of South Carolina and the American Revolution.

For almost exactly four years there is a complete blank in the statutes of South Carolina. Between March 20, 1771, and March 4, 1775, not one law was passed. An act reviving certain general duties and an act against counterfeiting the money of other colonies, both passed within a few days of each other in 1775, were the last laws enacted under the royal government. After 1769 no general tax bill was passed, with or without the £10,500.[1]

The dispute between the Commons and the Council regarding their powers and relations was never settled. When Governor Lord Campbell arrived in June, 1775, he addressed his message to "The Lower House of Assembly." Instantly the old furies leaped up.—May it please your Excellency! We cannot receive any communication so addressed. "It implies that there is another House in this colony dignified with the appellation of Upper House of Assembly, which we utterly deny. . . . . We cannot receive or admit on our Journals an address derogatory to the honor and dignity of this House." For five days the Commons simply met and adjourned. At last the Governor returned his message, addressed to "The Commons House of Assem-

1 Statutes at Large of S. C., IV., 331, 355.

bly," and disclaimed any special reason for using the term "Lower House." He was a stranger.[1] On September 15, 1775, Lord Campbell dissolved the last Assembly that ever sat in South Carolina under the British Government, and that same day fled to a man-of-war in the harbor.[2] The next lawmaking body that met was a single house of revolutionary origin, which could enjoy without hindrance the supreme power for which the Commons had so long striven.

1 Com. Jour. S. C., MS., XXXIX., pt. II., 302-5.

2 Com. Jour. S. C., MS., XXXIX., pt. II., 314; Charleston Year Book for 1884, 335.

CHAPTER XI.

Conclusion.

We have seen the English constitution in its new home reproduced and adapted to local requirements. It was the spirit of that constitution, and not its mere forms, that worked in the history of the province.

Americans of the present day are accustomed to conceive of an ordaining convention as necessary to establish a constitution, and may even fall into the absurdity of forgetting that the colonies before the Revolution had any constitutions. On the contrary, "the constitution," and "constitutional" were among the commonest phrases, though, as is necessary under an "unwritten constitution," exactly what was meant depended largely on the individual speaking. Viewed from the juristic standpoint, the royal instructions to Governors must be considered the written constitution of South Carolina. In no respect did they clash with the letter of acts of Parliament. They were divided into sections relating to the frame of government, the privileges and relations of the branches, the duties of officers, rules of administration, miscellaneous and temporary matters, and sometimes even contained a virtual bill of rights—a bill of rights, however, which, like "The Joyous Entrance" and other Netherland charters of liberties, was the grant of a sovereign as of grace, and not an assertion on the part of the people as of right. As Motley remarks, there is an essential difference between

liberties and *liberty*. There is much similarity between some parts of these instructions and royal charters, and the early State Constitutions. The frame of government of South Carolina was created by the instructions, and was carried on in strict accord with them save insofar as the Commons House of Assembly was able to vindicate a more democratic system.

The position of the Governor and Council was logical. They observed the instructions in all particulars as the constitution. The position of the Commons did not have the same consistency. When, in the early years of the development we have traced, the Commons pleaded that the intention of the King in the instructions was thus and so, they admitted in effect the validity of those articles as the colonial constitution. Even in recognizing the existence of the Council the Commons made the same admission. The only law creating the Council was the royal instructions. To acknowledge the sections creating the Council and deny those defining its functions was wholly illogical. The Council's right to existence and its right to coordinate legislative power were derived from the identical document. The Commons treated the instructions as the constitution where it suited their purposes, but refused to regard those sections that contradicted their interest and desires.

The significance of the fact that the colonists had been accustomed to written constitutions was great when they were thrown upon their own governmental resources. It was exemplified in the immediate and universal adoption of written frames of government as things already familiar.

What the Commons really made their model was the

constitution of the British House of Commons. They claimed, and with varying success vindicated, almost every privilege of their prototype. This claim they based on the laws extending to the colonies all the rights of Englishmen, and occasionally on the royal charter to the Lords Proprietors. The actual constitution of the province cannot with accuracy be designated. It can be exhibited but not defined; for it was not a settled thing, but was in process of becoming. To learn the full significance of the events we have witnessed, we must look beyond the Revolution to the constitution as expressed in the formal documents of 1776 to 1790.

Not until the Council began to be filled with placemen and ruled by a foreign element did the Commons attempt to deprive it of its legislative power. The history of that King-appointed body is one of continual decline. Before 1725 it amended money bills, appointed its quota of the committee of correspondence, and helped elect the agent. Gradually its power of amending the budget is taken away. In 1754 it ceases to be styled regularly the Upper House; in 1756 it loses its part in the control of the agent and the committee of correspondence. The Commons begin to grant the Governor funds without consulting the Council, and finally without reference to any other party in the government presume to appropriate money for their own purposes. The Council make a final stand from 1769 to 1775, and is formally declared by two judges and the unanimous vote of the Commons to be no branch of the legislature, but a mere Privy Council to the Governor.

This revolution in the internal government of the colony was independent of the American Revolution. There can be no doubt that if South Carolina had remained

for a few years more a British province, there must have been a great change in the constitution of its legislature.

When the Revolution came and the opportunity was given the Commons to put their theory into practice, they were perfectly consistent in dealing with the Council. The historical continuity of the constitutional development before and after the Revolution was unbroken. When the Constitution of 1776 was formed, the old Council of twelve was maintained as a Privy Council of seven, with all the functions of its predecessor except the legislative. As the Commons had desired the King to create a real Upper House, in 1776 they ordained that the House of Representatives, standing for the new sovereign, the people, should elect such a body, to be called the Legislative Council. In the Constitution of 1778 the Privy Council was still continued, with nine members, and a Senate elected by the people took the place of the Legislative Council. The old Council as the Carolinians understood it at the outbreak of the Revolution still existed; but this body was not the model for the Senate. In 1790 the Privy Council was abolished, and only for a short time, as the Executive Council of 1861, did any remnant of the once powerful legislative and executive Council reappear in South Carolina history. In the Constitutional Convention of 1895 there was a proposal to create a board of pardons to assist the Governor; but this attempt to revive a system of shackling and propping the executive found no favor. The Senate of the present is the descendent of His Majesty's Council in its early and better days. Thus does the fittest survive in American constitutional history and the unfit drop away as its uselessness is demonstrated.